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OF

THE HIGH COURT OF JUSTICE.

1901.

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OF

THE COURT OF APPEAL.

1901.

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DETERMINED BY THE

PROBATE DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

1900. 1901.

[IN THE CONSISTORY COURT OF LONDON.]

1900
July 12.

In re TALBOT.

Ecclesiastical Law—Jurisdiction—Faculty—Faculty for Removal of Remains from Consecrated to Unconsecrated Ground subject to Grant of Licence from Secretary of State—Evidence—Discretion—The Burial Act, 1857 (20 & 21 *Vict. c.* 81), *s.* 25—4 & 5 *Will.* 4, *c. lxxv.*

The 25th section of the Burial Act, 1857, provides that, except in the cases where a body is removed from one consecrated place of burial to another by faculty granted by the Ordinary, it shall not be lawful to remove any body or the remains of any body which may have been interred in any place of burial without licence under the hand of one of Her Majesty's Secretaries of State.

The superior of St. Edmund's College—one of the Roman Catholic theological colleges in England—applied to the Court for a faculty to authorize the removal of the remains of a former superior of the college from their place of interment in a vault in the churchyard of a parish church in the diocese of London to a vault under the chapel of the college wherein three of the predecessors of the petitioner and the deceased lay buried. It appeared that the owner of the vault from which it was proposed to remove the remains of the deceased could not be discovered, but

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that the incumbent of the parish church in whom the freehold of the churchyard was vested and the next of kin of the deceased consented to the proposed removal. No evidence was given that the vault under the college chapel had ever been consecrated.

The Court in its discretion granted the faculty; but, being of opinion that the vault under the college chapel was not a consecrated place of burial within the meaning of the above section, directed that the faculty should issue upon condition that it was not to be acted upon until a licence approving the place of reinterment had been obtained from a Secretary of State.

The removal of remains from unconsecrated places of burial being by the above section placed under the control of a Secretary of State, the Court cannot now, as it would have done before the passing of the Burial Act, 1857, refuse to exercise whatever jurisdiction it might possess to grant a faculty for the removal of remains to unconsecrated ground on account of the objection that the remains when removed would not be sufficiently protected from disturbance.

IN this case the Rev. Monsignor Bernard Ward, the President of St. Edmund's College, Ware, in the county of Hertfordshire, petitioned the Chancellor of the Diocese of London (Dr. Tristram, Q.C.) for a faculty to remove the remains of the Hon. and Rev. James Talbot, titular Bishop of Bertha and Vicar-Apostolic of the Roman Communion, from their place of interment in a vault in the Hammersmith and St. Paul's consecrated cemetery at Hammersmith, in the county of Middlesex and diocese of London, to a vault within the precincts of St. Edmund's College aforesaid.

The petition alleged, inter alia, that the governing body of St. Edmund's College, near Ware, one of the theological colleges of the Roman Catholic Church in England, was desirous of securing the reinterment of all the former ecclesiastical superiors of St. Edmund's College within the precincts of the college; that the remains of three bishops exhumed from the recently demolished church of St. Mary in Moorfields, London, had already been removed to and reinterred in a vault under the chapel of the college with the performance of suitable religious rites by Cardinal Vaughan, and that the deceased, the Hon. and Rev. James Talbot, was a former ecclesiastical superior of St. Edmund's, and died, being of the age of sixty-four years or thereabouts, on January 28, 1790, and was buried on February 1, 1790, in consecrated ground in the Hammersmith

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and St. Paul's Cemetery at Hammersmith, in the county of Middlesex.

The petition further alleged that the next of kin and nearest legal representatives of the deceased, and the Duke of Norfolk as the chief representative of the family of the deceased, were consenting parties to the application for the proposed faculty.

Affidavits were brought in verifying the above material allegations in the petition, together with a copy of the burial certificate of the deceased, which had been obtained from the vicar of the parish of Hammersmith.

On April 5 last counsel, on behalf of the petitioner, moved for the faculty before the Chancellor of the Diocese of London in court; but the motion was adjourned in order that notice of the application might be given (1.) to the vicar of Hammersmith, in whom it appeared that the freehold of the Hammersmith and St. Paul's Cemetery was vested under the provisions of s. 7 of the special Act relating to the cemetery (4 & 5 Will. 4, c. lxxv. (1)); and (2.) to the owners, if they could be found, of the grave or vault in which the deceased was buried.

In an affidavit filed on April 16 last the petitioner stated that if the faculty was granted it was proposed to reinter the remains of the deceased in a vault under the college chapel of St. Edmund's College.

July 12. The adjourned motion came on again for hearing before the Chancellor of the Diocese of London.

J. B. Atlay appeared for the petitioner. He stated that the vicar of Hammersmith had had notice of the application, and that a letter had been received from him consenting to the remains of the deceased being removed from the cemetery, and that the deceased had been interred and now lay buried in the family vault of Mr. James Banyard, but that the present owner of the vault was not known.

(1) Entitled, "An Act for making the hamlet of Hammersmith within the parish of Fulham, in the county of Middlesex, a distinct and separate Parish, and for converting the Perpetual Curacy of the church of St. Paul's, Hammersmith, into a vicarage and for the Endowment thereof."

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[DR. TRISTRAM. The petitioner should shew on affidavit that, search having been made for the legal representative of the family to whom the vault belonged in 1790, no such person has been found to whom notice of the proposed removal can be given. An affidavit to this effect should be filed. The freeholder of the cemetery and the representatives of the deceased having, however, consented to the application, the Court, if no such representative can be found, might sanction the removal of the remains for reinterment under the college chapel, provided they would be there under the protection of the Home Secretary by s. 25 of the Burial Act of 1857. (1)]

It is submitted that the Court, notwithstanding the provisions of that section, still possesses all its inherent jurisdiction as to faculties, including the jurisdiction required by the petitioner to be exercised in this case. The Act was not intended to curtail, and has not curtailed, the jurisdiction of the Ordinary to remove remains interred in consecrated ground to whatever place may be thought fit, the object of the 25th section of the Act of 1857 being merely to afford protection to remains buried in unconsecrated ground. If the petitioner is right, and the Court still possesses jurisdiction to grant the faculty as prayed, but is of opinion that in its discretion it ought not to allow the faculty to issue except subject to a licence for the removal being obtained from a Secretary of State, an application would be duly made by the petitioner to the Home Office for that purpose.

(1) The 25th section of the Burial Act, 1857 (20 & 21 Vict. c. 81), provides as follows:—

"Except in the cases where a body is removed from one consecrated place of burial to another by faculty granted by the Ordinary for that purpose, it shall not be lawful to remove any body, or the remains of any body, which may have been interred in any place of burial, without licence under the hand of one of Her Majesty's principal Secretaries of State, and with such precautions as such Secretary of State may prescribe as the condition of such licence; and any person who shall remove any such body or any remains contrary to this enactment, or shall neglect to observe the precautions prescribed as the condition of the licence for removal, shall, on summary conviction before any two justices of the peace, forfeit and pay for every such offence a sum not exceeding 10*l.*"

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DR. TRISTRAM. In this case a very important question of practice has been raised. I am asked by the petitioner to grant a faculty for the removal of the remains of the deceased from the consecrated place of burial where they are now interred to ground which is not consecrated in the sense in which the law understands consecration. I have not been able to find any precedent prior to the date of the passing of the Burial Act, 1857, of any Ecclesiastical Court having granted a faculty for the removal of remains from consecrated to unconsecrated ground, although it is clear that up to the date of that Act the Ecclesiastical Courts were not precluded from granting such a faculty either by canon or by statute law. The practice of the Ecclesiastical Courts, however, previous to the passing of this Act, was to decline to grant a faculty authorizing remains buried in consecrated ground to be reinterred in unconsecrated ground, as by so doing they would be sanctioning the removal of remains from a place of burial under the special protection of the Ecclesiastical Courts to a place of interment under the protection of no Court—provided the remains when placed there were not treated either with indignity or so as to create a nuisance—in either of which cases the party responsible for the indignity or the nuisance was for the offence liable to be indicted at common law: see *Foster* v. *Dodd.* (1) Such being the state of the law prior to 1857 as to the protection of bodies buried in unconsecrated ground, s. 25 of the Burial Act of 1857 placed for the first time bodies buried in unconsecrated ground under the protection of the statute law of this country by providing that "except in the cases where a body is removed from one consecrated place of burial to another by faculty granted by the Ordinary for that purpose, it shall not be lawful to remove any body, or the remains of any body, which may have been interred in any place of burial without licence under the hand of one of Her Majesty's principal Secretaries of State, ... and any person who shall remove any such body or remains contrary to this enactment . . . . shall, on summary conviction before any two justices of the peace, forfeit and pay for every such offence a sum not exceeding ten

(1) (1867) L. R. 3 Q. B. 67.

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pounds." The ground on which the Court would formerly have refused to grant the faculty prayed for in this case having thus been removed, the Court, having regard to the circumstances of the case, has come to the conclusion that in the exercise of its discretion it ought to grant the faculty, but being of opinion that the words of the above section, "except in the cases where a body is removed from one consecrated place of burial to another by faculty," must be construed as having reference to removal from one consecrated place of burial in England (to which country the Act only applies) to another consecrated place of burial in this country, it directs the faculty to issue upon condition that it is not to be acted upon until a licence has been obtained from the Home Secretary under the above section approving of the place of reinterment.

The practice of the Court, where it entertains no doubt that a licence from the Home Secretary is necessary for the removal of remains as ancillary to the faculty, is to decree the faculty subject to the Home Secretary's licence being obtained. But in a case where there is any doubt in the mind of the Court whether a licence is necessary, the practice is to issue the faculty without any such proviso, leaving the party to whom it is granted to apply or not as he may be advised for a licence before taking action on the faculty.

Solicitors for petitioner: *Lee, Bolton & Lee.*

C. F. J.

THE HOLAR.

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Nov. 5.

Admiralty—Compulsory Pilotage—Port of Blyth—Foreign Vessel—Newcastle Pilot Act (41 *Geo.* 3, *c. lxxxvi.*), *s.* 6.

Pilotage is compulsory on a foreign vessel resorting to, or coming into, or departing from, the port of Blyth, for that port is one of the creeks or members of the port of Newcastle-upon-Tyne unaffected by legislation subsequent to the Newcastle Pilot Act, 1801 (41 Geo. 3, c. lxxxvi.), s. 6.

ACTION of damage by collision.

The plaintiffs were the owners of the steam-tug *George Peabody*. The defendants were the owners of the steam vessel *Holar*.

The case is reported on the question of pilotage being compulsory for foreign vessels in the port of Blyth.

On February 15, 1896, about 2 A.M. the *George Peabody*—an iron paddle steam-tug belonging to the port of Blyth of 115 tons gross register, engines of 55 horse-power nominal, and a crew of four hands—was attending the steam vessel *Volturno*, inward bound to Blyth, in the entrance of Blyth Harbour between the east and west piers. The weather was fine, the wind light, and the tide half flood. The *Volturno* had a tug ahead, and the *George Peabody* was made fast astern as a steering tug, when, as the Court found, she was run into and damaged by the *Vadso* proceeding down the river, with a Blyth pilot on board, outward bound from Blyth to Bandholm, in Denmark, with a cargo of coals.

The *Vadso* was a Norwegian steam vessel. Her name had been changed to the *Holar* prior to her arrest in April, 1900, in a Scottish port. At the hearing, on October 30, by Gorell Barnes J., assisted by two of the Elder Brethren of the Trinity House, the Court held that the collision was solely occasioned by the fault of the pilot on board the *Vadso* (now known as the *Holar*), and the question of the pilotage being compulsory was reserved.

Nov. 5. Evidence was given on behalf of the defendants that the jurisdiction of the corporation of master pilots and

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seamen of the Trinity House of Newcastle-upon-Tyne extended over the Tyne under charters granted by Henry VIII. (1536), Edward VI. (1548), Queen Mary (1553), and Queen Elizabeth (1584), and also over its members and creeks by charters granted by James I. (1606), Charles II. (1660), and James II. (1687) (1), and existed at the time (1801) of the passing of the Newcastle Pilot Act rendering pilotage compulsory on foreign vessels entering or leaving the port of Newcastle-upon-Tyne, or any of the creeks or members belonging thereto (2); that Blyth was one of those members, and that the pilot in charge of the *Vadso* (now the *Holar*) was duly licensed for the district in which the collision took place.

On behalf of the plaintiffs the evidence shewed that foreign vessels had gone in and out of the port of Blyth without a pilot, and without any proceedings being taken against them; that in the parliamentary papers on pilotage, printed by order of the House of Commons, containing abstracts of returns relating to pilots and pilotage in the United Kingdom as furnished by the various pilotage authorities, the port of Blyth was returned as "free." (3)

(1) See Brand's History of Newcastle-upon-Tyne, (1789) vol. ii. pp. 324 to 332, and Appendix, p. 710.

(2) 41 Geo. 3, c. lxxxvi. (local): "An Act for extending and enlarging the powers and increasing the rates and duties of the corporation of the Trinity House of Newcastle-upon-Tyne, and for better regulating the port of Newcastle."

Sect. 6: "And be it further enacted that the owners or masters of any foreign ships or vessels resorting to, or coming into, or departing from the said port of Newcastle, or any of the creeks or members belonging thereto, shall, and they are hereby obliged and required respectively to receive, take on board, and employ in the piloting and conducting such their ships or vessels, such pilots to be licensed as aforesaid; and in case of their neglect or refusal to receive and employ such pilots as aforesaid, they shall severally nevertheless answer and pay to the master, pilots, and seamen the aforesaid pilotage duties, and the same shall be recoverable in the same manner as if such pilots had been actually received and employed: Provided always, that nothing in this Act contained shall extend or be construed to extend to oblige or compel the owners or masters of any British ships or other vessels, to employ or make use of any pilot or pilots in piloting or conducting such ships or vessels if they shall not respectively be aminded or desirous so to do."

(3) E.g. Pilotage Return for 1892, No. 263, vol. lxxx., 1893–4, p. 45.

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Aspinall, *Q.C.*, and *Stubbs*, for the defendants, the owners of the *Holar*. The pilot was in charge by compulsion of law, for the wording of s. 6 of the Newcastle Pilot Act of 1801 is such as to make pilotage compulsory on foreign vessels entering or leaving the port of Newcastle-on-Tyne, or any of the creeks or members belonging thereto: *The Maria* (1); and though since 1865 pilotage has ceased to be compulsory in the Tyne by reason of a code of regulations superseding the provisions of the Act of 1801—*The Johann Sverdrup* (2)—the port of Blyth is one of the members belonging to the port of Newcastle which has remained unaffected by subsequent legislation. The evidence produced is sufficient to raise a primâ facie case, and it lies on the plaintiffs to shew that the Act of 1801 has been repealed in respect of the port of Blyth.

Laing, *Q.C.*, and *Balloch* (*Dumas* with them), for the plaintiffs, the owners of the *George Peabody*. Pilotage has ceased to be compulsory at Blyth, for though the Newcastle Pilot Act, 1801, did purport to impose compulsory pilotage on foreign vessels in the Tyne and its creeks and members, of which Blyth is one, whilst British vessels were declared exempt, s. 6 of that Act has been impliedly repealed, and, with the exception of the creeks and members of the Tyne, the whole jurisdiction of the Trinity House of Newcastle has been swept away by provisions made with a view to abolish the differential rates formerly existing as between British and foreign vessels. This has been effected in two ways. First, by the method of transfer effected by a provisional order made by the Board of Trade (under the authority of s. 39 of the Merchant Shipping Act, 1862, 25 & 26 Vict. c. 63, for which s. 576 of the Merchant Shipping Act, 1894, 57 & 58 Vict. c. 60, is now substituted), followed by a confirmation Act, as in the case of the Tyne itself, for by the Tyne Pilotage Order Confirmation Act, 1865 (28 & 29 Vict. c. 44), the whole of the river Tyne was transferred from the jurisdiction of the Trinity House of Newcastle-upon-Tyne to the Tyne Pilotage Commissioners, and, under s. 16 of the schedule to that Act, pilotage is not compulsory—that is to say, the Act of 1801 was repealed by a code of pilotage

(1) (1839) 1 Wm. Rob. 95. (2) (1886) 11 P. D. 49; 12 P. D. 43.

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rules made under parliamentary sanction: *The Johann Sverdrup*. (1)

Secondly, the object has been attained by means of by-laws confirmed by an Order in Council, and made by an existing pilotage authority under ss. 332, 333, 334 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), for which ss. 581, 582, 583 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), are now substituted. With regard to the creeks and members of the Tyne, of which Blyth is one, and which alone remained within the jurisdiction of the Master and Brethren of the Trinity House of Newcastle-upon-Tyne, by-laws were made by that Trinity House, under s. 333 of the Merchant Shipping Act, 1854, which were confirmed by Order in Council of February 14, 1883 (Parliamentary Return of Pilotage, 1889, No. 154, p. 75). These repeal previous by-laws, assume for other purposes the existence of the Act of 1801, and contain the following material words: "The pilotage dues shall be paid to the sub-commissioners or to the pilot performing such pilotage duty, within five days after the performance thereof." This shews that the compulsory pilotage on foreign ships imposed by the Act of 1801 had disappeared, and that the dues were only payable in the event of the pilotage being actually performed. The effect of the code of pilotage rules made under an Order in Council authorized by statute has been to repeal the Act of 1801 in respect of the compulsory pilotage of foreign vessels at Blyth, just as the code confirmed by statute was held in *The Johann Sverdrup* (1) to have repealed the Act of 1801. That in practice compulsory pilotage has ceased is shewn by the parliamentary returns stating that the port of Blyth is "free," and by the evidence that no proceedings are taken against foreign vessels for non-payment of pilotage if not performed.

Aspinall, Q.C., in reply. The abolition of compulsory pilotage in the case of foreign vessels cannot be inferred from the abolition of differential rates: *The Vesta*. (2) The by-laws of 1883, relied on by the defendants, are stated in the preamble to be made under s. 333 of the Merchant Shipping Act, 1854.

(1) 11 P. D. 49; 12 P. D. 43. (2) (1882) 7 P. D. 240.

That section gave pilotage authorities power to make by-laws; but it was s. 332 which gave power to exempt from compulsory pilotage, and, therefore, the alleged exemption has no legal existence. In other cases, where there has been a transfer of jurisdiction from the Trinity House of Newcastle-upon-Tyne, as in the case of Hartlepool, under 27 & 28 Vict. c. 58, and of the Tees, under 45 & 46 Vict. c. i., plain words have been used in s. 16 of the schedule to the Hartlepool Act, and s. 15 of the schedule to the Tees Act, which take away the obligation to employ a pilot under 41 Geo. 3, c. lxxxvi.

GORELL BARNES J. I have already decided that the collision which occurred in the port of Blyth between the plaintiffs' steam-tug *George Peabody* and the defendants' steam vessel *Vadso*, now called the *Holar*, was solely occasioned by the fault of the pilot of the *Vadso*, and I have now to determine whether the pilot was in charge of the defendants' vessel by compulsion of law.

The *Vadso* was a Norwegian steamship, and, by s. 6 of the local Act of 1801 (41 Geo. 3, c. lxxxvi.), foreign vessels resorting to, or coming into, or departing from the port of Newcastle, "or any of the creeks or members belonging thereto," are required to employ pilots licensed by the proper authority, and, in the event of neglect or refusal, pilotage is recoverable as if a pilot had been employed.

It has been proved that the port of Blyth is one of the creeks or members of the port of Newcastle within the meaning of the section in question, and, shortly put, the contention of the defendants is, that, by the Act of 1801, pilotage was in respect of foreign vessels rendered compulsory over the Tyne and various creeks or members belonging to the port of Newcastle, and that nothing has since taken place, so far as the port of Blyth is concerned, to repeal or vary this section of the Act.

On the other hand, the plaintiffs assert that pilotage is no longer compulsory on foreign vessels in the port of Blyth by reason of a change of regulations affecting the port—in other words, they contend that what has since taken place has been sufficient to repeal s. 6 of the Act of 1801 so far as compulsory

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pilotage is concerned. In support of this contention they rely upon a new code alleged to have been established by by-laws made in 1883 pursuant to s. 333 of the Merchant Shipping Act, 1854, the provisions of which section are repeated in s. 582 of the Act of 1894.

Now, there is no doubt that originally the port of Blyth formed part of the port of Newcastle, so far as pilotage is concerned, and that from time to time in recent years the Act of 1801, and the jurisdiction of the Trinity House of Newcastle-upon-Tyne, have been affected by taking out of the Act various ports, including Newcastle itself, and constituting fresh authorities for the purpose of dealing with pilotage within those various ports; but it does not appear that this has been done with regard to Blyth.

There is, however, another section of the Act of 1854 which must be considered, namely, s. 332 (s. 581 of the Act of 1894), by which power is given to pilotage authorities to make and extend exemptions from compulsory pilotage, whilst s. 333, under which the by-laws of 1883 were made, does not deal with the question of compulsory pilotage at all, but deals, amongst other things, with the power to alter and reduce the rates of pilotage.

I think it is clear, when the by-laws in question are considered, that there is nothing in them which purports to deal with the rights conferred under s. 332, although there is to a certain extent under s. 333 a change in the rates, for, under the Act of 1801, there was a difference between the rates on British and foreign ships, but by the by-laws of 1883 all are put upon the same footing.

Looking at the matter, therefore, as affecting the port of Blyth, I cannot find anything in the by-laws of 1883 which in any way modifies the obligation to employ a pilot imposed upon a foreign vessel by the Act of 1801.

Counsel for the plaintiffs, however, contend that this case must be decided upon the same lines as that of *The Johann Sverdrup* (1), with the result that compulsory pilotage will be found to be abolished in respect of the port of Blyth; but that

(1) 11 P. D. 49; 12 P. D. 43.

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case relates to the Tyne, and the Tyne has been taken out of the operation of the Act of 1801 by virtue of a provisional order embodied in the Act of 1865, which now contains a complete code of regulations respecting pilotage in the river Tyne. That provisional order was made under s. 39 of 25 & 26 Vict. c. 63, by which the Board of Trade was enabled, amongst other things, to transfer pilotage jurisdiction, to constitute new pilotage authorities, and to make exemptions from compulsory pilotage in any district.

The Act of 1865 gave effect to the provisional order in respect of the Tyne. A body of commissioners was constituted for the Tyne, the pilotage district was defined, the jurisdiction vested in the Trinity House of Newcastle-upon-Tyne was transferred to the commissioners, the pilotage dues were provided for, and by s. 16, "Nothing in this order shall extend to oblige the owner or master of any vessel to employ . . . . any pilot . . . . if he is not desirous so to do."

It was held in *The Johann Sverdrup* (1) that that provisional order contained a complete code of regulations respecting pilotage in the river Tyne, and that its provisions superseded those of 41 Geo. 3, c. lxxxvi., and that, therefore, under s. 16 of the schedule, pilotage was not compulsory in the case of either British or foreign vessels in the Tyne. It seems to me, however, that that case has no application to the matter before me, because it is dealing, and is concerned solely, with the effect of an Act of Parliament confirming a provisional order. In the present case there is no provisional order, and no Act of Parliament varying the effect of the Act of 1801. There is only a set of by-laws made by the pilotage authority still existing as far as the port of Blyth is concerned—the Trinity House of Newcastle-upon-Tyne—and those by-laws are only made by virtue of s. 333 of the Merchant Shipping Act, 1854.

It is, however, urged by counsel for the plaintiffs that, by the terms of the by-laws of 1883, there has been an abolition of compulsory pilotage, and reliance is placed upon the latter part of the clause headed "Rates of pilotage," which says that "the pilotage dues shall be paid to the sub-commissioners or to the

(1) 11 P. D. 49; 12 P. D. 43.

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pilot performing such pilotage within five days after the performance thereof." It is argued that as the pilotage dues are only to be paid to the sub-commissioners " after " the pilot has performed the pilotage duties, they cannot possibly be paid where the pilot has not performed the duty, and that that implies that the dues cannot be compulsorily imposed; but these words are only a repetition of what is to be found in the latter part of s. 7 of the Act of 1801, and the compulsion imposed by s. 6 cannot be construed to be taken away merely because s. 7 speaks of the pilotage dues being paid within five days after the pilotage duties have been performed. Moreover, it appears to me that there is nothing to shew that there has been any custom or usage with regard to the matter, for though evidence has been given that cases have occurred in which foreign ships have not been asked to pay after coming in or going out of port, and though there may have been a misconception on the point, that does not, to my mind, affect the question whether pilotage is compulsory in law.

The conclusion to which I have come on reading these Acts of Parliament, and the by-laws above referred to, is that there is nothing to be found which in any way abolishes the compulsion imposed by s. 6 of the Act of 1801, so far as the port of Blyth is concerned, though there is a reduction of the rates in accordance with the powers conferred by the Merchant Shipping Acts. For these reasons I must hold that the pilotage in this case was compulsory by law, and that the defendants are exonerated from responsibility.

Solicitors for plaintiffs, the owners of the *George Peabody : Ince, Colt & Ince, for William Charlton, Blyth.*

Solicitors for defendants, the owners of the *Holar : Stokes & Stokes.*

T. L. M.

THE ROMANCE.

1900
Nov. 14.

Admiralty—Collision — Salvage— Towing Lights—"Under Way"—Anchor Light—Regulations for Preventing Collisions at Sea, 1897, *preliminary article, and arts.* 3, 11.

A steam-tug is "under way" within the meaning of the preliminary article of the Regulations for Preventing Collisions at Sea, 1897, when she is fast alongside a vessel which she is moving up to her anchor preparatory to towing her away; and the tug should, therefore, exhibit the towing lights and side lights required by art. 3 of the same regulations, though, *semble*, the vessel herself, whilst her anchor is still in the ground, should continue to exhibit the anchor light required by art. 11 of the same regulations.

ACTION of salvage.

The plaintiffs were the owners, master, and crew of the *Knight of the Cross*.

The defendants were the owners of the *Romance*, her cargo and freight.

The case is reported on the question of the lights to be exhibited by a steam-tug whilst attending a vessel in the process of getting up her anchor.

On the night of August 13, 1900, the *Romance*—a Norwegian wooden barque of 596 tons register, from a Canadian port to Garston, with a cargo of timber, a crew of ten hands, and a pilot on board—was lying at anchor, head down river, off Monk's Ferry in the Mersey, with her anchor lights up. The weather was fine and clear, with a light north-westerly wind, and the tide was flood of the force of about five knots. About 11 P.M., being about two hours before high water, the *Knight of the Cross*—a twin-screw steam-tug of 249 tons gross register, with two sets of engines working independently up to 800 effective horse-power, and of the value of 6000*l.*—which had been engaged to dock the *Romance*, arrived, and made fast on the port side, whilst another steam-tug, the *Conductor*, engaged to assist in docking, came up soon afterwards, and was made fast on the starboard side. Both tugs exhibited the

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regulation lights for a steam vessel towing another vessel (1), and whilst they were holding the barque against the tide, and moving her up to her anchor with a view to her getting it in preparatory to being towed to Garston, those in charge of the tugs saw a steamship, called the *Javary*, coming up the Mersey, and which was being swept by the strong tide on to the bows of the *Romance*. A collision being inevitable, the two tugs slipped their ropes and backed clear. The *Romance* was struck on the stem, and, the force of the blow driving her back, her chain snapped, and she broke adrift.

For subsequent services rendered by the *Knight of the Cross* and another steam-tug (the *Torfrida*) in towing the barque, in her damaged condition and hampered by wreckage, to mooring buoys, and finally, about noon the next day, into dock, the owners, masters, and crews of both tugs brought actions of salvage, which were consolidated, but that of the *Torfrida* (the owners of which were also the owners of the *Conductor*) was settled out of court.

The value of the *Romance* was 180*l*., that of her cargo 1422*l*., and freight 613*l*.—total, 2215*l*. Her owners by their defence alleged that the *Knight of the Cross* was not entitled to salvage remuneration on the ground that the collision with the *Javary* was caused by the negligence of those on board the *Knight of the Cross* and the *Conductor* in improperly exhibiting their under-way lights, thereby misleading those on board the *Javary*, and they counter-claimed for the damage sustained. (2)

Aspinall, *Q.C.*, and *Collingwood Hope*, for the owners, master and crew of the *Knight of the Cross*.

Pickford, *Q.C.*, and *Dawson Miller*, for the owners of the *Romance*, her cargo and freight.

The arguments of counsel fully appear from the judgment.

(1) Regulations for Preventing Collisions at Sea, 1897, art. 3: "A steam vessel when towing another vessel shall, in addition to her side lights, carry two bright white lights in a vertical line, one over the other, not less than six feet apart. . . ."

(2) The counter-claim was withdrawn during the hearing.

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GORELL BARNES J. This is a claim for salvage services made by the owners, master, and crew of the steam-tug *Knight of the Cross* against the owners of the barque *Romance*, her cargo and freight.

The salvage services are not disputed, except upon one ground, namely, that the collision between the *Javary* and the *Romance* was caused by the negligence of those in charge of the two tugs engaged to take the *Romance* into dock—that is to say, for the purposes of this action, by the negligence of those in charge of the *Knight of the Cross* in improperly exhibiting their under-way lights.

It appears that both tugs, which were made fast to the sides of the *Romance*, had their towing lights and their side lights up, and that the *Romance* herself had her anchor lights up, and the main point raised is one of law, namely, whether the tugs had their wrong lights up in the circumstances, and, therefore, may be said to have contributed to the collision by misleading the *Javary* into treating the vessels as being really in motion and about to move into the adjoining docks.

Now this point turns upon the construction of the rules with regard to lights. The tugs and the barque, having the lights which I have stated, had moved by the propelling power of the tugs up to a point nearly over the anchor of the *Romance*. Those in charge of the barque have not been called, and therefore it is not clear whether the anchor of the barque was actually holding or not, but I do not think it necessary to find that fact specifically. I rather incline to the view that the anchor was still holding the barque, because when the jerk came afterwards which broke the cable the anchor must have been in the ground still, and, therefore, the barque, for the purpose of the point I am going to decide the case upon, was still—within the meaning of the decision in *The Esk and The Gitana* (1)—at anchor.

In these circumstances it is contended by counsel for the defendants that the tugs ought not to have had towing lights and side lights, but only to have had anchor lights up. I cannot, however, agree with that view. The object of the rules, so

(1) (1869) L. R. 2 A. & E. 350.

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far as these lights are concerned, is to indicate to approaching vessels what those who are exhibiting the lights are doing; and it seems to me as a matter of fact that in this case the lights exhibited shewed exactly what they were in fact doing, namely, that the ship was still at anchor, and that the tugs were towing her up to get her anchor. Moreover, the Elder Brethren advise me that it is the practice for tugs, when towing a ship up to her anchor in order to get it, to exhibit towing lights, while the ship would still have her anchor lights up. It is, however, said that although that may be so, yet according to the rules there is blame to be attributed to the tugs. The point in substance is this—that the tugs were at anchor and not under way, and should have had anchor lights up, in other words, that art. 3 is not applicable, but that the anchor lights article (art. 11) is applicable, so that the tugs ought to have carried the lights referred to in that article, because, having regard to the definitions in the preliminary article of the Regulations for Preventing Collisions at Sea, they were not under way, but were at anchor.

On the other hand, counsel for the plaintiffs contend that art. 3 applies—that is to say, that the tugs were right in exhibiting the towing lights required by that article, and that they were "under way" within the meaning of the rules. It seems to me that upon the true construction of the rules the tug was, in the circumstances of the case, towing the sailing vessel, the *Romance*, and was under way within the meaning of the rules. The question as to what lights the ship herself should have had has not been argued—the question has been what lights the tug should have had—but it is perhaps necessary to consider all the rules which relate to this question of lights in order to arrive at a clear conclusion. My present impression is that the barque—though it is not necessary for me to decide the point—had the right lights, and that the provisions of art. 5 requiring side lights were not applicable to her; that is to say, she was not a vessel being towed within the meaning of that article, because she was not, strictly speaking, under way; but I do not think it at all follows that the tugs may not have been towing her under art. 3. In fact, I think the tugs were towing her and were under way. It

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seems to me that only by a violent construction of the last paragraph of the preliminary article of the regulations can the defendants' contention be maintained. That paragraph is: "a vessel is 'under way' within the meaning of these rules when she is not at anchor, or made fast to the shore, or aground." It has been contended that the tug in this case was at anchor because, if the barque was at anchor, as the tug was attached to her, the tug is to be treated as using the barque's anchor as her own anchor, and, therefore, at anchor too, and should have had her anchor lights up; but the tug in this case was not at her own anchor. Was she then under the control of the ship's anchor? I think not. She was in fact moving the ship up to her anchor, and was under way for that purpose just as much as if she had been made fast ahead and was towing her by means of a towing hawser.

I think it would be straining the interpretation of these rules if I were to uphold the defendants' contention. It seems to me that the proper construction to place upon the rules is that the tug in this case was carrying proper lights, and, that being so, the defence upon that part of the case fails. Moreover, the Elder Brethren cannot see, nor can I, how the carrying of these lights in any way contributed to the collision. What really seems to have been the case is that the other vessel was coming up upon an extremely strong flood tide without sufficient allowance for the position of these vessels.

The only matter which remains to consider is, what amount should be awarded? No serious risk was run by the tug, and the total value of the property was very small—only 2215*l.* After considering the whole of the nautical questions involved with the Elder Brethren, I think that the sum of 175*l.* will be an adequate reward for the services of the *Knight of the Cross*, with costs on the High Court scale.

Solicitors for plaintiffs, the owners, master, and crew of the *Knight of the Cross*: *Miller & Son, Liverpool.*

Solicitors for defendants, the owners of the *Romance*, her cargo and freight: *Weightman, Pedder & Weightman, Liverpool.*

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Nov. 5.

[IN THE COURT OF APPEAL.]

DORMER (otherwise WARD) *v.* WARD.

Nullity—Impotence—Marriage Settlements—Petition for Variation—"Property Settled"—Matrimonial Causes Act, 1859 (22 & 23 *Vict. c.* 61), *s.* 5—*Matrimonial Causes Act*, 1878 (41 & 42 *Vict. c.* 19), *s.* 3.

The jurisdiction of the Court, conferred by the 5th section of the Matrimonial Causes Act, 1859, and extended by the 3rd section of the Matrimonial Causes Act, 1878, to inquire into the existence of ante-nuptial and post-nuptial settlements, and to make orders varying the same, is not limited to any particular class of nullity cases, but includes all cases in which a decree of nullity has been pronounced, upon whatsoever ground.

Where, in a marriage settlement, property is charged in favour of the intended beneficiaries, the "property settled," within the meaning of s. 5 of the Matrimonial Causes Act, 1859, is the charge and not the property charged.

Where property is settled under a marriage settlement, conditionally on the happening of a future event, and the marriage has been pronounced to be void before the happening of the event, the Court cannot ignore the condition, and vary the settlement in respect of the property so settled.

By a marriage settlement the respondent, the intended husband, covenanted with trustees to pay to them, if the marriage should take place, a yearly sum of 200*l.*, in trust to pay the same to the petitioner, the intended wife, during the joint lives of husband and wife. He also, in virtue of certain powers vested in him, appointed in favour of the petitioner, if she should survive him, a jointure rent-charge, to be charged on certain specified hereditaments, and secured by a term of years to commence from his death. He also in exercise of powers vested in him appointed certain other hereditaments to the use of the trustees for a term of years, to raise a capital sum the interest of which was to be paid to him during his life, and after his decease the fund was to be held in trust for the issue of the marriage, and in default of issue for the intended wife, but subject to the proviso that no part should be raised during his lifetime without his consent in writing. The marriage took place, but, on the petition of the wife, a decree of nullity of marriage was made on the ground of the impotence of the respondent. On an application by the petitioner to vary the settlement:—

Held, that, although the marriage had been declared void, and the covenant as to the payment of 200*l.* a year no longer took effect, the Court had jurisdiction under the Matrimonial Causes Act, 1859, on the application of the petitioner, to vary the settlement in respect of that settled property:

Held, also, that the Court would have had power to vary the settlement as to the jointure rent-charge, and the capital sum directed to be raised,

on the ground that they were "property settled" within the meaning of the Matrimonial Causes Act, 1859, but for the conditions that the former was only to commence after the death of the respondent, and that the latter could not be raised in his lifetime without his consent, neither of which events had happened.

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APPEAL from the judgment of Gorell Barnes J., reported [1900] P. 130, on a motion by the petitioner, in opposition to the report of a registrar upon a petition for variation of a settlement made on the marriage of the petitioner and the respondent.

The settlement was dated May 27, 1885, and the parties were married on the following day, and they afterwards resided together.

The petitioner commenced a suit in this Court against the respondent, claiming a declaration that her marriage was null and void on the ground of the impotence of the respondent. The suit was heard before the President, and a decree nisi was pronounced by him, which was afterwards made absolute. The petitioner, by leave, presented a petition to the Court under the Matrimonial Causes Acts, 1859 and 1878, to obtain a variation of the settlement for her benefit. The petition having been referred to a registrar, he reported that the respondent raised, amongst other points, the question of the jurisdiction of the Court to vary settlements in the case of a marriage declared void by reason of impotence; and thereupon the matter came before the Court.

The first point taken by the respondent was that the powers of the Court could not be exercised in the case of a decree of nullity of marriage on the ground of impotence, but only applied in cases where there were, or might have been, children.

Sect. 5 of the Matrimonial Causes Act, 1859, is as follows: "The Court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of antenuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the

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children of the marriage or of their respective parents as to the Court shall seem fit."

Sect. 3 of the Matrimonial Causes Act, 1878, is as follows: "The Court may exercise the powers vested in it by the provisions of section five of the Act of the twenty-second and twenty-third years of Victoria, chapter sixty-one, notwithstanding that there are no children of the marriage."

The questions upon the terms of the settlement with regard to the "property settled" by it arose under the following state of facts, which is taken from the judgment of the learned judge in the Court below.

Under an indenture of settlement dated December 8, 1874, made between the respondent's father (who died before the date of the marriage settlement) and the respondent and certain trustees, the lands and hereditaments comprised in the schedules to the marriage settlement of May 27, 1885, together with other hereditaments, were limited, subject, as to part, to a jointure rent-charge of 1200*l.* payable thereout to the respondent's mother (who had since died) during her life, and to a term of 500 years for securing the same, to such uses, upon such trusts, and with and under such powers, agreements, and declarations as the respondent should by any deed or deeds, with or without power of revocation and new appointment to be executed by him after his father's death, or by his will or any codicil or codicils thereto, from time to time appoint, but, subject and without prejudice to any lease and every contract for a lease or leases subsisting at the date of the said indenture of settlement, and subject thereto to the use of the respondent and his assigns for his life without impeachment of waste, with divers remainders over; and in the same indenture was contained a power for the respondent, after his father's decease, by deed or will to charge the settled premises with the payment to himself or any other person of any money not exceeding 8000*l.* and interest, as therein mentioned, and to appoint all or any part of the same premises for any term or terms of years for securing the same. This power had not at the time of the marriage settlement been exercised. In the same indenture was also contained a power for the respondent, either before or

after his marriage with any woman, by deed with or without power of revocation and new appointment or by will or codicil to appoint to any woman whom he might marry, for life or for any less period, as from the day of his death if she should survive him, any yearly rent-charge or rent-charges of any amount whatsoever payable after his father's death, whether the respondent should survive him or not, such rent-charge or rent-charges to be in bar or not to be in bar of dower and free-bench, as to the respondent should seem fit, and to be charged upon and payable out of all or any of the premises by the said indenture of settlement assured without any deduction, and to be paid at such times and in such manner as to the petitioner should seem meet, and to appoint to such woman usual powers and remedies for recovering and enforcing the same, and to appoint the premises so charged to any person or persons for any term or terms of years with or without impeachment of waste, upon trust for better securing payment of the rent-charge or rent-charges by mortgage (with a power of sale if thought fit) or otherwise as to the respondent should seem fit.

By the marriage settlement made between the respondent, the petitioner, her father, and certain trustees, the respondent, in consideration of the intended marriage, covenanted with the trustees that if the said intended marriage should take place the respondent would during the joint lives of himself and the petitioner pay to the trustees a yearly sum of 200*l.* to accrue from day to day, but to be payable by equal quarterly payments, the first of such payments to be made on such of the quarterly days as should happen next after the solemnization of the said intended marriage, and the trustees were to pay the said annual sum of 200*l.* as the same should become due so long as the same should continue payable to the petitioner, but so that she should not have any power of anticipation.

By the same deed, in consideration of the intended marriage, and in exercise of the special power vested in him by the indenture of settlement, the respondent limited and appointed to the use of the petitioner and her assigns during her life, in case the intended marriage should take effect and she should survive him, the rent-charges following, that is to say, if and so long

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as his mother should be living, the yearly rent-charge of 1300*l.*; and from and after her death the yearly rent-charge of 1600*l.*, the said rent-charges or such of them as should take effect to be in full for her jointure and in lieu of all dower and freebench whatsoever, and to be charged upon and issuing out of all the hereditaments and premises comprised in the 1st schedule thereto (subject as to part of the said hereditaments to the said yearly rent-charge of 1200*l.* and the said term of 500 years, and subject, as to all the said hereditaments, to the powers of leasing and sale and exchange and management contained in the indenture of settlement), such rent-charges to be considered as accruing from day to day, but to be payable quarterly without any deduction except succession duty, if any, the first of such payments as to the said rent-charge of 1300*l.* to be paid at the end of three calendar months after the death of the respondent if the petitioner and the respondent's mother should then both be living, and as to the said rent-charge of 1600*l.* to be made at the end of three calendar months after the death of the survivor of the respondent and his mother if the petitioner should then be living; and in consideration of the intended marriage and in exercise of the special power vested in him for that purpose by the indenture of settlement, the respondent, as beneficial owner, appointed the hereditaments and premises thereinbefore charged with the jointure rent-charges (subject nevertheless as last aforesaid) unto and to the use of the trustees for the term of 1000 years, to commence from the death of the respondent, to secure the payments of the said rent-charges.

By the same deed, in consideration of the intended marriage and in exercise of the general power of appointment vested in him by the indenture of settlement and of all or any other power in that behalf him enabling, the respondent, as beneficial owner, appointed the hereditaments and premises comprised in the 2nd schedule to the marriage settlement to the use of the trustees for the term of 1200 years, to commence from the solemnization of the intended marriage, without impeachment of waste (but subject as therein mentioned), upon trust to raise the sum of 20,000*l.* with interest for the same at 4 per cent.

per annum computed from the solemnization of the intended marriage, and to stand possessed thereof upon trust for investment and to pay the interest and annual produce to the respondent and his assigns during his life and after his decease, as to the corpus of the fund and the annual produce thereof, in trust for the issue of the marriage as the respondent should appoint, and in default as the petitioner should after the respondent's death appoint, and in default for the children equally except as in the deed provided, and in default of issue attaining a vested interest, in trust for the respondent. The deed contained a proviso that no part of the 20,000*l.* or of the interest thereof should be raised during the lifetime of the respondent except with his consent in writing.

The petitioner's application was that the marriage settlement should be varied so that the petitioner should receive an allowance. The learned judge dismissed the application. (1)

The petitioner appealed.

July 31. *Danckwerts*, *Q.C.*, and *Frank Russell*, for the petitioner. Under the Matrimonial Causes Act, 1859, s. 5, the power of the Court to deal with the settlement was confined to cases where there were children of the marriage, or supposed marriage, though it extended to cases of nullity of marriage. By the amending Act (41 & 42 Vict. c. 19), s. 3, the power is given notwithstanding that there are no children of the marriage, and therefore there is nothing to exclude cases of nullity of marriage on the ground of impotence.

[They cited on this point *Thomas* v. *Thomas* (2); *Bird* v. *Bird* (3); *Corrance* v. *Corrance*. (4)]

Secondly, there is settled property in this case with which the Court can deal under the Acts. The date which must be looked at, in order to see whether there is such property, is the date of the settlement. Property is settled, although it may only be contingently settled. Moreover, in this case the contingency happened upon which the settlement was to take effect, for a marriage took place. In the cases of *Chapman*

(1) [1900] P. 130.
(2) (1860) 2 Sw. & Tr. 89.
(3) (1866) L. R. 1 P. & M. 231.
(4) (1868) L. R. 1 P. & M. 495.

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v. *Bradley* (1) and *Pawson* v. *Brown* (2) the supposed marriages were absolutely null and void, being within the prohibited degrees, whereas the marriage in the present case was merely voidable. The 5th section of the Act of 1859 applies to cases of absolutely void marriages, and to hold that in such cases there is no settled property, because a settlement only takes effect on a valid marriage, would be practically to deprive the section of efficacy in most cases of nullity of marriage, though it in terms applies to such cases. But whatever may be the case with regard to marriages void ab initio, in this case the contingency upon which the settlement was to take effect happened. It may be true that the effect of the decree absolute is to declare the marriage null and void retrospectively, but the jurisdiction of the Court to decree that the marriage is null and its jurisdiction to deal with the settlement must be looked at as a whole, and the exercise by the Court of its power to deal with the settlement is part of the decree of nullity. The settlement is therefore only abrogated by the decree of nullity so far as the Court does not exercise its jurisdiction to deal with the settlement. The effect of the legislation is really that the Court has power to make the variation of the settlement a term of the decree.

[They cited on this point *Worsley* v. *Worsley* (3); *Jump* v. *Jump* (4); *Clifford* v. *Clifford* (5); *Elliott* v. *Gurr* (6); *Norton* v. *Seton*. (7)]

Assuming that a marriage took place within the meaning of the settlement, then it is contended that there clearly was settled property with which the Court was entitled to deal within the meaning of the section. It is submitted that the learned judge in the Court below confused "the property settled" with the interests given by the settlement in that property. The interests of the parties before the Court in the property to which the settlement related constituted amply sufficient material, with which the Court was entitled to deal

(1) (1863) 4 D. J. & S. 71.
(2) (1879) 13 Ch. D. 202.
(3) (1869) L. R. 1 P. & M. 648.
(4) (1883) 8 P. D. 159.
(5) (1884) 9 P. D. 76.
(6) (1812) 2 Phil. Ecc. Rep. 16.
(7) (1819) 3 Phil. Ecc. Rep. 147.

for the purposes of the Act, and out of which the Court could carve an allowance for the petitioner. The respondent has a general power of appointment over the property, and subject to that a life interest in it. The property settled means for the purposes of the section the property which is subject to the trusts of the settlement—the property which is tied up and taken out of the control of the settlor. The essence of the provisions of the Act is that it contemplates a dealing with the property settled not in accordance with the limitations of the settlement, but by way of variation of them, whereas the learned judge below seems to have acted on the footing that he could only deal with the property in accordance with those limitations. The Act is meant to enable the Court to make a fresh settlement for the parties. The cases of *Chapman* v. *Bradley* (1) and *Pawson* v. *Brown* (2) were not analogous to the present case. It was not a question there of an application to vary a settlement under the powers which the Court is asked now to exercise. In both those cases the supposed marriage was absolutely void, and not merely voidable. In *Chapman* v. *Bradley* (1) both parties to the supposed marriage were dead, and an action was brought by a creditor in the Court of Chancery for the administration of the property. It is obvious that wholly different considerations apply in such a case. The same observations apply to the case of *Pawson* v. *Brown*. (2) In *Hartopp* v. *Hartopp* (3) an interest was brought into existence which did not exist under the settlement. As to the existence of property settled, it is submitted, first, that the Court clearly has power to order the continuance of the payment of 200*l*. per annum for the benefit of the petitioner under the covenant. That covenant took effect directly the marriage was solemnized, and has been in operation from that date till the present time. The only limitation of it is to the joint lives of the petitioner and respondent. It is not restricted to their joint married lives. It is no answer to the application to say that an action can be brought to enforce the covenant. Secondly, with regard to the jointure rent-charge

(1) 4 D. J. & S. 71. (2) 13 Ch. D. 202.
(3) [1899] P. 65.

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upon the properties mentioned in the 1st schedule to the settlement; there is nothing to confine the powers of the Court to property in possession. "Settled property" for the purposes of the section includes property settled in reversion or contingent reversion. The Court can order that on the happening of the contingency, namely, the petitioner's surviving the respondent, the whole or part of the jointure shall be paid. There are no words in the settlement making it a condition that the petitioner must survive the respondent as his widow. Thirdly, with regard to the sum of 20,000*l.* charged on the property mentioned in the 2nd schedule; clearly there is a beneficial interest conferred in præsenti with which the Court can deal, and out of which they can order an allowance to be paid to the petitioner. The term created with regard to that property commenced on the marriage and is still subsisting. Apart from the sum of 20,000*l.*, there is, until that is raised, a trust of the rents and profits for the benefit of the respondent for life —that is, settled property out of which the Court could order an allowance to the petitioner. There is also a present charge of the 20,000*l.*, although it is not to be raised in the respondent's lifetime without his consent, and the Court could order the 20,000*l.* to be raised without the respondent's consent.

Renshaw, *Q.C.*, and *R. J. Parker* (*Priestley* with them), for the respondent. Sect. 5 of 22 & 23 Vict. c. 61 only contemplated marriages of which there could be children, and therefore the present case is not within that section. The effect of the amending enactment is only to provide that in the case of marriages that might otherwise fall within the original enactment the fact that there are not actually any children shall not exclude its operation, but the amending Act has not the effect of extending the powers of the Court to the case of a marriage which was not within 22 & 23 Vict. c. 61, s. 5. If that had been the intention, the natural thing would have been to provide that the Court might exercise the power in favour of either of the parties whose marriage was the subject of the decree.

Secondly, there was not in the present case any settled property within the meaning of the Act. The power of the

Court does not arise until after the decree nullifying the marriage, and the Court has then to inquire into the existence of ante-nuptial or post-nuptial settlements, and may make an order for the purposes of the section with regard to the whole or part of the property settled. The Court cannot under the section direct property to be brought into settlement which is not in settlement, or direct money to be paid which has to be paid before it is brought into settlement. Its power is limited to dealing with property actually settled. This is not a settlement made by the owner of the whole estate in the property, but by the owner of a limited estate subject to powers. There is a great distinction for this purpose between property and power. The covenant for payment of the 200*l.* per annum merely creates a debt, and is not property settled on the petitioner. Either the covenant continues in force after the decree of nullity, in which case it can be sued upon, or it does not. In the one case no order of the Court is necessary. In the other none ought to be made. If the covenant came to an end the Court cannot treat the annuity as property settled. With regard to the provisions for raising 20,000*l.* for portions; there again there is no property settled which the Court has power to deal with under the Act. Portions are never raised till they are wanted. The 20,000*l.* cannot be raised in the lifetime of the respondent without his consent. All the Court can do is to order the application of existing settled property; it cannot order money to be raised and brought into settlement for the purpose of ordering it to be applied for the benefit of the petitioner. It is not settled property till it is raised. The Court would not control the exercise of the discretion of trustees to raise this capital sum, and the case is stronger when, as here, the discretion is in the settlor, who cannot be ordered to consent in writing to the sum being raised.

With regard to the jointure rent-charge, that is not in the nature of settled property—on which expression the Court must put some limitation. All that the respondent has done is to appoint that, if the petitioner survives him, the jointure shall arise and be charged on the property. There can be no property in it during the respondent's life. If the Court

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were to make any order as to that, it would affect the rights of the remainderman entitled to the property, who is not before the Court. The question whether the petitioner is entitled to the jointure under the circumstances will arise on the respondent's death, if the petitioner survives him, but the Court ought not to do anything to prejudice the position of the remainderman with regard to that question.

[They cited also *Micklethwait* v. *Micklethwait* (1), *Boddington* v. *Clairat* (2), and *A.* (*otherwise M.*) v. *M.* (3)]

Danckwerts, Q.C., in reply.

Cur. adv. vult.

1900. Nov. 5. VAUGHAN WILLIAMS L.J. read the following judgment:—The first question to be decided in this case is whether the Court has or has not jurisdiction to make an order under s. 5 of 22 & 23 Vict. c. 61 (1859), as amended by 41 & 42 Vict. c. 19, s. 3 (1878), in a case in which there has been a decree of nullity of marriage on the ground of impotence.

It was decided in *Thomas* v. *Thomas* (4), before the full Court, that in a case where there were no children of the marriage the Court had no jurisdiction to make an order under s. 5 of the Act of 1859. It was decided in *Bird* v. *Bird* (5) that the Court had no power to make an order under s. 5 unless there was issue living at the time when the motion for the order was made. This was followed in *Corrance* v. *Corrance* (6), a decision of the full Court, with the slight, though not unimportant, variation that the time of the decree, and not the time of the motion, is made the crucial time. These cases were all cases of dissolution of marriage. The ground of the decisions was the words "for the benefit of the children of the marriage or of their respective parents." It was said that this language clearly shewed that the Legislature did not intend the power under this section to arise unless there were living children for whom provision might and ought to be made. If there were such children, then and then only the Court had

(1) (1858) 4 C. B. (N.S.) 790.
(2) (1883) 22 Ch. D. 597; (1884) 25 Ch. D. 685.
(3) (1884) 10 P. D. 178.
(4) 2 Sw. & Tr. 89.
(5) L. R. 1 P. & M. 231.
(6) L. R. 1 P. & M. 495.

power to make orders for them or their parents. "It might," said Montague Smith J., "in some cases be prudent and convenient, where a home is broken up, that provision should be made for the children, not only directly by giving a benefit to them, but also indirectly by giving a benefit to their parents."

Then comes the Act of 1878, s. 3, which provides that the Court may exercise the powers of s. 5 of the Act of 1859 notwithstanding that there are no children of the marriage. This provision renders inapplicable so much of the reasoning of the Court as is based on the assumption that the power to make orders for the benefit of parents was subsidiary to the governing object of the Legislature—namely, to enable the Court to make a provision for the children of the marriage. The section is by the amending Act to apply in cases where there is no parent because there is no child. Nevertheless the word "parent" remains in the section. What does it mean? Does it mean to include under the word "parent" only a person who has been a parent, but no longer is so by reason of the death of the child, or does it mean also to include every party to a marriage irrespective of whether he or she ever has been a parent or could so become?

The word "parent" in this section must, in my opinion, mean the same in relation to dissolution of marriage as it does in relation to nullity of marriage. Can the power under s. 5 arise in a case where there is a divorce, and there neither has been nor is issue of the marriage? I do not think anything turns on impotency. Now, it would seem that in several cases orders have been made for the benefit of one of the parties to a marriage of which there has not been any issue. *Farrington* v. *Farrington* (1); *A.* (*otherwise M.*) v. *M.* (2), a nullity case; *Meredyth* v. *Meredyth* (3), are all cases to shew that the Court has exercised the power under s. 5 of the Act of 1859 in cases where there never had been issue of the marriage. In these cases the point does not seem to have been much, if at all, discussed; but in the case of *Wigney* v. *Wigney* (4) the question was directly raised and argued, and, according to Sir

(1) (1886) 11 P. D. 84.
(2) 10 P. D. 178.
(3) [1895] P. 92.
(4) (1882) 7 P. D. 177.

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George Jessel, the amendment contained in the latter section was not expressed in the most artistic way, because, where there were no children of the marriage there could be no parent to whom the former section could in terms apply; but what was meant, of course, was that, where there were no children the persons to be benefited were the divorced husband and wife. This seems a direct decision by the Court of Appeal on the point; it was followed by the Court of Appeal in *Ponsonby* v. *Ponsonby*. (1) If, then, the word "parent" includes divorced persons who have never had children, I cannot see why it should not include parties to a marriage avoided on the ground of nullity in a like case, especially as s. 5 expressly applies after a decree of nullity of marriage.

Now, assuming that the Court has jurisdiction under s. 5 to make orders with reference to the application of the settled property, notwithstanding the fact that the parties to the avoided marriage have never had any child, it still remains to consider the question whether there is in this case any property settled as to which the Court can exercise its jurisdiction by making an order with reference to the application of it. Now, generally, no doubt, it is true that the section only gives power to make orders with reference to the application of property settled, and does not give the Court power to vary the settlement by treating as settled property which is not settled. But it is obvious that, inasmuch as the section applies to decrees of nullity of marriage, there must, if the section is to apply at all to nullity cases, be a power not only to make orders with reference to the application of the property settled amongst the beneficiaries contemplated by the settlement, but also for application of the property settled in favour of persons outside the settlement and under conditions outside the settlement. In other words, the Court must read in the settlement child or children as meaning a child or children who are not issue of a marriage, and who are, therefore, illegitimate, and must read marriage as including a connection which is no marriage at all, being a voidable marriage which has been avoided. The section says that the Court may inquire into the existence of settlements.

(1) (1884) 9 P. D. 122.

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Existence at what time? I think this means the existence of settlements at the time of pronouncing the decree: *Corrance* v. *Corrance*. (1) Now, I propose to read this settlement in the light of these conclusions. I find that at the time of the pronouncing of the decree a settlement existed between Mr. and Mrs. Ward. I do not find that the settlement continued in force after the decree. In my opinion this settlement did not do so. But I think that the Court has power to make orders with reference to the application of the property settled by the settlement in existence at the time of the decree, and I think that, on a motion for an order for the application of property settled, the Court, in the case of a decree of nullity, must, for the purpose of the order (if the section is to be applied to cases of nullity at all), read the settlement as if extended and varied so as to make the words "parties whose marriage" connote parties whose marriage was no marriage, and, as must be necessary in a case where the decree of nullity was not based on impotency, "children" and "respective parents" connote illegitimate children and their unmarried father and mother. This is not merely to make an order for the application of "property settled," but to vary the settlement by making those beneficiaries under the settlement who, but for the order of the Court, would take no benefit under it. Unless one does this one makes the section a dead letter and of no effect in a nullity case.

This settlement begins with the recital of the intended marriage, and witnesseth that, in consideration of the intended marriage, E. G. Ward covenants with trustees that he will, during the joint lives of himself and G. J. Dormer, pay them a yearly sum of 200*l.*, to be payable by quarterly payments on August 28, November 28, February 28, and May 28, the first of such payments to be made on such of the same days as shall happen next after the solemnization of the said intended marriage; and that the trustees shall pay the said 200*l.* to G. J. Dormer without power of anticipation. Now, in my judgment, the whole of this clause, and indeed the whole settlement, is according to its terms conditional upon a valid

(1) L. R. 1 P. & M. 495.

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marriage taking place, and, although it is true that until the declaration of nullity this marriage was voidable only and not void, and that, therefore, that which has been done under the settlement cannot be undone, I yet think that this covenant in the settlement cannot be enforced after the decree of nullity without an order under s. 5, and I do not agree with the argument approved by Gorell Barnes J., that the covenant was either still in force or at an end, and that the petitioner must accept one of these alternatives, and, therefore, could only ask the Court to enforce a legal right which has nothing to do with an application under s. 5. I think that there was a third course open to the petitioner, who, I think, had no legal right which she could enforce; for, in my opinion, the declaration of nullity would be a complete answer to an action on the covenant. It seems to me that the right, and the only right, of the petitioner in respect of this covenant is to apply to the Court under s. 5 to make an order for the application of this 200*l.* for her benefit. This, of course, is pro tanto to vary the settlement, because, unless there was a valid marriage, she, in my judgment, is not entitled to the benefit of the covenant. She could not recover on the covenant unless varied, but I think, for reasons which I have already given, that the Court in case of a decree of nullity can and ought to vary the settlement, treating for the purpose of the order that which was no marriage as if it had been a valid marriage, and make the order for application for the benefit of a woman not a wife of this yearly sum of 200*l.*

The next subject-matter which can be considered as property settled by the marriage settlement is the jointure rent-charge limited and appointed to the petitioner and the term of 1000 years to secure it. Now, it is said that the jointure rent-charge and term could only come into force if the marriage should take effect, and that as the marriage has been declared void it did not take effect, and the jointure rent-charge and term cannot come into force, and the settlement was without consideration. Gorell Barnes J. says that the cases of *Chapman* v. *Bradley* (1) and *Pawson* v. *Brown* (2) support these reasons.

(1) 4 D. J. & S. 71.

(2) 13 Ch. D. 202.

I agree with the learned judge as to the effect of these cases, except that, as a deed does not require consideration, I should rather have said the condition had not happened on which the deed was to take effect than that the deed was without consideration. But I do not agree with the learned judge as to the result; for, as I have already said, inasmuch as all marriage settlements are subject to the condition of marriage, if one were to hold that the Court cannot under s. 5 apply settled property for the benefit of the wife and children unless there has been a valid marriage, it would be to hold that the powers of s. 5 can never be exercised in the case of a decree of nullity; but the section says that the powers may be exercised in such a case. This, in my opinion, by necessary implication, gives the Court the power to vary the settlement to this extent. But there is a further objection to making an order in respect to this jointure rent-charge and term which seems to me practically fatal—that is, that the jointure and term could not commence till after the death of the respondent. I do not think that the Court by the exercise of its powers under s. 5 can vary the settlement by ignoring this condition. The reasons which I have given for holding that the Court in the case of nullity has the power to vary the settlement by extending the connotation of the words "marriage" and "children" have no application to such a condition of the settlement. It may be that the Court could make an order subject to the petitioner surviving Mr. Ward to take effect after his death; but, even if the Court can, I do not think they ought to do so. The Court might, however, give power to renew the application.

With regard to the power to raise the 20,000*l.*, my view is substantially the same as that with reference to the jointure rent-charge and term. I do not agree with Gorell Barnes J. that this is not "property settled" because there has been no valid marriage, or because the consideration has failed, or the condition of marriage not occurred; but I do think that we cannot vary the settlement by ignoring the condition that this fund cannot be raised during the lifetime of the respondent without his written consent, which has not been given.

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I agree with what I understand to be the opinion of Gorell Barnes J., that what has been brought into settlement in this settlement, so far as the charges are concerned, is not the property upon which the charges are made, but the charges themselves; but there is one argument which was brought before us by Mr. Danckwerts, and was also urged by him before Gorell Barnes J., with which I have yet to deal. It is this—that the whole of the hereditaments and premises comprised in the schedules to the marriage settlement were property settled by that settlement, and that the Court could therefore under the terms of s. 5, which gives the Court power to make orders with reference to the application of the whole or a portion of the property settled for the benefit of children or their respective parents, order that the whole or a portion of the hereditaments and premises be applied for the benefit of the petitioner. The learned judge answers this by saying, "It seems a very extraordinary proposition that, because a charge —it may be a very small one—is created on a large real estate by a marriage settlement, the whole estate can be dealt with by the Court under the powers created by the sections aforesaid." I agree with him as to this; but this is not the argument which was urged before us by Mr. Danckwerts. On the contrary, he expressly admitted before us that such an argument could not be supported. What he did urge before us was that the result of the settlement of 1885 was that Mr. Ward no longer took the rents and profits of the scheduled estates and premises under his original title, the settlement of 1874, but takes them under the settlement of 1885, and that therefore the Court can make an order for the application of those rents and profits. Now the clause Mr. Danckwerts relied on was the clause relating to the 1200 years' term. It could not relate to the 1000 years' term, because that was only to commence from the death of Mr. Ward, and the surplus after paying the rent-charge charged upon it was to go to the person or persons for the time being entitled to the reversion, immediately expectant on the said term, to the premises therein comprised—that is, the persons entitled after the death of Mr. Ward, for the term was only to commence after his death.

But the 1200 years' term was to commence from the solemnization of the said intended marriage, and it is said did commence, although it might be voidable. Now, the trusts of that term were to raise and stand possessed of the sum of 20,000*l.*, which 20,000*l.* has not been raised, because it could only be raised in the lifetime of Mr. Ward by his written consent, which has not been given. The trust then goes on: "Provided always that subject to the trust hereinbefore declared concerning each of the said terms"—i.e., the trust in favour of Mr. Ward's mother, who was dead before the declaration of nullity—"and to the rights of the trustees and trustee for the time being of such respective terms to raise by any of the means aforesaid, and to pay or reimburse themselves or himself all costs, charges, and expenses in relation to the said several trusts, the rents and profits of the hereditaments and premises comprised in each of such terms respectively, or such part thereof as shall from time to time remain after satisfying the said trusts shall be taken and received by the person or persons for the time being entitled to the said premises in reversion immediately expectant on such respective terms." Now, it is said that the term of 1200 years is still in existence, or, at all events, was in existence immediately before, and at the time of, the declaration of nullity, and that the duty of the Court is to inquire into the existence of settlements made on the parties whose marriage is the subject of the decree. It is said that "in existence" means in existence at the date of the decree, and that, although the inquiry is to be made after the decree, it is to be made as of the date of the decree, and that the Court having regard to s. 5 must be taken, on making the decree, to have reserved to itself the right to deal with the settlement as of that date. If this is right—and I am inclined to think it is—the only question would be whether Mr. Ward immediately before and at the date of the decree was taking and receiving the rents and profits of the hereditaments and premises comprised in the term under, and by virtue of, the marriage settlement of 1885. This point was not dealt with at any length by the counsel for Mr. Ward, but the answer as I understood it was twofold—(1.) the only effect of these words, in the events which have happened, was to except these rents

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and profits from the operation of the settlement, save in so far as they should be required for the purpose of satisfying the trusts. The proviso was likened to the ordinary proviso in a marriage settlement that the settlor shall be entitled to receive the rents and profits unless and until the intended marriage takes place; (2.) it was said that this proviso had at the date of the decree no operation whatever because at that date there were no trusts whatever to be performed by the trustees; Mr. Ward, senior, was dead, and the 20,000*l.* had not been raised, and, in the absence of the written consent or death of Mr. Ward, could not be raised; in other words, that the proviso had no application excepting in the case of surplus profits after satisfying the trusts, and that there were none. On the whole, I think, notwithstanding these answers made on behalf of the respondent, that Mr. Ward at the date of the decree of nullity was receiving the rents and profits under and by virtue of the settlement of 1885, and I am fortified in this view because at the date of the settlement Mr. Ward was not the owner in fee of the estates mentioned in the 2nd schedule, but only in receipt of the rents and profits under and by virtue of the settlement of 1874, and had at most only an equitable life estate. He then, by the settlement of 1885, exercises the powers of appointment conferred upon him by the settlement of 1874, and from that time forward it seems to me that his right to receive the rents and profits was based upon the settlement of 1885.

I think that this appeal should be allowed, and that the matter should be sent back to Gorell Barnes J. with an intimation that we think that an order should be made for the application for the benefit of the appellant of so much of the 200*l.* and the rent and profits as to the learned judge may seem fit.

A. L. SMITH M.R. The Lord Chancellor and I agree in the judgment which has been delivered.

Appeal allowed.

Solicitors for petitioner: *Witham, Roskell, Munster & Weld.*
Solicitors for respondent: *Few & Co.*

A. M.

B. (OTHERWISE H.) *v.* B.

1900
May 14.

Nullity of Marriage—Non-consummation—Impotence presumed.

From the fact of non-consummation of a marriage after a reasonable period of cohabitation, during which one of the parties was always willing and anxious and repeatedly urged that the marriage should be consummated, the Court may draw the inference that something more than seemingly mere wilful refusal must have animated the other party, who has in fact persistently refused to consummate the marriage, and has also refused to obey the usual order to attend for medical inspection. In such a case, the Court may properly assume the existence of some latent impediment amounting to incapacity.

The principle laid down by the Court (Jeune P.) in *F.* v. *P. (falsely called F.)*, (1896) 75 L. T. 192, in the case of a female respondent, followed and extended to the case of a male respondent.

WIFE'S petition for nullity.

The petitioner alleged a ceremony of marriage in March, 1896, and non-consummation thereof by reason of the respondent's impotence.

The certificate of Christopher Heath, F.R.C.S., and George Garlick, M.D., F.R.C.S., the medical inspectors appointed by the registrar, was to the effect that they examined the parts of generation of the petitioner, which they found to be well developed and normal, and which presented well-marked evidence of virginity. Mr. Heath was called as a witness at the hearing, and stated, in answer to a question by the learned judge, that he was sure that the petitioner was a virgin. The case on behalf of the petitioner was that during the wedding tour, which lasted some five or six weeks on the Continent, the respondent, in spite of the petitioner's repeated protests, insisted on occupying a separate room, and that on one occasion when the petitioner went into the respondent's room at night and waited there till the respondent came, he was very angry at finding her there and ordered her out, and, on her refusing to go without an explanation of his conduct towards her, the respondent became very abusive, and went out and locked himself in the petitioner's room, where he remained alone all that night.

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On their return to England the respondent proposed that the petitioner should go to her friends; but as she positively refused to leave him, they went to his house, where he still refused to allow the petitioner to share his bedroom, and left the house on the following morning before the petitioner was up.

The petitioner wrote several letters to the respondent, and some weeks afterwards received from him a letter to the effect that he was willing that they should live together on the condition that they should occupy separate bedrooms, and asking for an answer by messenger.

The petitioner saw the respondent and reluctantly assented.

After further scenes and separations, the petitioner threatened to consult her solicitor, whereupon the respondent joined her in London, promised to treat her in future as his wife, and proposed that she should accompany him to Hastings, whither they accordingly proceeded on November 5, 1896.

There, for the first time since the marriage, they occupied the same room and the same bed. The respondent, however, did not consummate the marriage, but promised that on their return home the ordinary relations of husband and wife should commence. Shortly before leaving Hastings, on one occasion he, according to the petitioner, "pretended" to have intercourse with her, and said that he did have intercourse with her; but in fact the marriage was not consummated.

In February, 1897, on their return home, the respondent still persisted in his refusal of marital intercourse. After further angry scenes, the petitioner, later in that month, came to London and consulted her present solicitors.

Certain deeds relating to monetary matters and separation were executed, but the petitioner absolutely refused to have any clause inserted which would expressly preclude her from taking proceedings for divorce, nullity, or judicial separation.

The petitioner entered into these deeds most unwillingly, as she was fond of the respondent, and always wished to live with him as his wife. She, however, saw no other way of recovering certain property which had belonged to her, and of which the respondent had become possessed under an agree-

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ment for a settlement executed about six weeks before the date of the ceremony of marriage.

The petitioner made several endeavours to induce the respondent to live with her, but to no purpose.

Eventually this petition was presented, and the respondent appeared in due course and filed an answer denying the allegation of impotence, and praying for the dismissal of the petition.

On the morning of the day appointed for the usual medical inspection of the parties, a letter was received from the respondent's solicitor stating that the respondent declined to submit himself for examination. His solicitor, however, attended at the registry, and identified the petitioner.

GORELL BARNES J. Is not this a case of mere wilful refusal to consummate the marriage?

Bargrave Deane, Q.C. (*Spokes* with him, for the petitioner). The Court is entitled to assume that there is an impediment. *F.* v. *P.* (*falsely called F.*) (1) is a direct authority for that proposition.

Le Bas, for the respondent, offered no opposition.

GORELL BARNES J. I think I am entitled to draw the inference which entitles the petitioner to the relief which she seeks. There will, therefore, be a decree nisi, with costs.

Solicitors for petitioner: *Edmonds & Rutherford.*

Solicitors for respondent: *Mills, Curry & Gaskell.*

(1) 75 L. T. 192.

H. D. G.

1900
March 19.

In the Goods of TRIGG.

Administration—Grant to Person without Interest in the Estate—Renunciation of Next of Kin solely entitled in Distribution.

The Court granted administration to a person who had no interest in the estate of an intestate, where the only next of kin, the sole person entitled in distribution, had renounced the right to the grant.

In the Goods of Johnson, (1862) 2 Sw. & Tr. 595, followed.

Motion for administration.

Howard Fielder Trigg died on February 4, 1900, intestate, without parent, leaving Mary Gertrude Trigg, his sister and only next of kin. She was twenty-three years of age, but, being in delicate health and unacquainted with business matters, she, by an instrument in writing in common form, dated February 24, 1900, formally renounced her right and title to the grant, and consented to the same being made to her uncle, William Guiver Wright, one of the persons who would have been entitled to the grant as next of kin had she not survived her brother.

This renunciation having cleared off the only person entitled to the grant in priority to the uncles and aunts of the intestate, the said William Guiver Wright applied on March 1, 1900, for administration; but the grant was refused on the ground that although it was in the discretion of the Court, yet it was beyond the powers of the registrar to make it.

The reason why the grant was desired was that a large part of the intestate's estate was derived under the will of his father, John Fielder Trigg, of which the uncle was one of the trustees, and, further, because the business of a corn dealer originally formed part of the father's estate, and was actually carried on by the trustees of the father's will for some years, and was only transferred to the intestate on his coming of age and on his giving to the trustees an indemnity under an indenture dated July 25, 1894. By this indenture his interest in the other estate of his father was made a first charge to the trustees for

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TRIGG, IN THE GOODS OF.

the time being, in the event of the trustees being called upon to set apart sums to meet annuities or the expenditure on leaseholds, or in case the father's estate should otherwise prove insufficient. Moreover, the business of a corn dealer was being carried on by a manager, and it was highly desirable in the interests of the estate that the applicant should be appointed, as he, being engaged in business in the same road, would be able to supervise the business until sale, and could probably make better terms for the sale of the business. The trustees under the father's will were directed to convert the realty into personalty. The gross value of the estate was about 19,000*l.*

Barnard, for the applicant, William Guiver Wright, submitted that the case was covered by authority: *In the Goods of Mary Keane* (1); *In the Goods of Johnson.* (2) The latter decision seems the more nearly in point.

GORELL BARNES J. The grant may go. The case of *In the Goods of Johnson* (2) appears to cover this case.

Solicitor: *E. F. Day.*

(1) (1828) 1 Hagg. Ecc. 692. (2) 2 Sw. & Tr. 595.

H. D. G.

1900
Nov. 26.

In the Goods of ISAAC MOORE.

Will—Execution—Acknowledgment—Discrepancy between Attestation Clause and Affidavit of Attesting Witness—No Evidence of any Writing on First Page at Time of Execution—Probate.

In the case of a holograph will, the whole operative portion of which was written on the first page of a sheet of paper, the attestation clause containing the signature of the testator was written on the second page and stated that the will was "signed" by the testator in the presence of the witnesses. An affidavit, made by one witness only, stated that they did not see the first page at all, and set forth facts pointing to acknowledgment only in the presence of the witnesses:—

Held (by Sir F. Jeune, President, doubting), that the will was entitled to probate without notice to the next of kin.

Motion for probate by executors.

The registrar had refused to grant probate, on the ground that there was no evidence to shew that there was any writing on the first page of the paper, that page having been turned face downwards on the testator's desk during the whole time the witnesses were present and attested the document. The will was holograph. The various bequests were written on the first page, at the foot of which there was a space. Overleaf, on the second page, the signature appeared in the attestation clause, which stated that it was "signed and delivered" in presence of the witnesses.

Only one of the witnesses made an affidavit as to execution, and this affidavit she declined to make in common form, but insisted on stating the facts. These were to the effect that on the date of the will the testator called her and the other attesting witness into the room where he was, the will being there found spread out before him on the table. The ink of the signature "Isaac Moore" was, to the best of her belief, still wet. The testator said, "I want both of you to sign this." They thereupon attested and subscribed the will in the presence of the testator and of each other.

The testator's solicitor made an affidavit stating that the

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ISAAC MOORE, IN THE GOODS OF.

whole of the document, excepting the names of the witnesses, was in the testator's handwriting.

At the time of his decease he left a widow of unsound mind, but no child or parent. The whereabouts of the next of kin could not be found, and no notice by advertisement or otherwise had been given to them.

Newson, for the applicants. It is not necessary that the attesting witnesses when they sign should see any part of the will except the signature, or that they should even know that the document is testamentary: *Keigwin* v. *Keigwin*. (1) Apart from fraud, if a will is holograph, and if everything appears regular on the face of it, the presumption is that the testator duly signed or acknowledged and that the witnesses duly attested it: *Lloyd* v. *Roberts*. (2) The Court should not insist on notice to the next of kin.

SIR F. JEUNE, PRESIDENT. The case cited from the Privy Council hardly goes the length of saying that the Court is to presume that a will was signed in the presence of witnesses when, although the attestation clause purports to say that it was, the attesting witness who makes an affidavit for probate says that it was not. The affidavit proves acknowledgment. I entertain serious doubt whether the next of kin ought not to have been cited, but under all the circumstances I will allow probate to go.

Solicitors: *Foulger & Robinson, for Grigson & Robinson, Watton.*

(1) (1843) 3 Curt. 607. (2) (1858) 12 Moo. P. C. C. 158.

H. D. G.

1900
Nov. 7

STAMFORD AND ANOTHER *v.* WHITE.

Will—Cancellation—Erroneous Impression of Testator as to the effect of an earlier Settlement—Probate of Cancelled Document.

A testator, on the execution of a will in 1895, caused a will of 1882 to be cancelled under the erroneous belief that funds comprised in a settlement of 1855 would, in the absence of certain provisions in the will of 1882, be divided equally amongst the children of his first marriage. In 1896 he executed a fresh will, and revoked the will of 1895, and later in 1896 he executed two codicils, but the settled funds were not mentioned in any of the documents of 1896.

In a suit by the executors propounding the will and codicils of 1896 together with the will of 1882 :—

Held, that the will of 1882 was, in law, a valid and subsisting testamentary document, and that it should be included with the three documents of 1896 in the probate.

PROBATE SUIT.

The plaintiffs, the Right Hon. William, Earl of Stamford, and Charles Francis Martelli, as surviving executors, claimed probate of the last will, dated January 1, 1896, together with two codicils thereto, dated respectively February 11, 1896, and May 5, 1896, as well as the contents of a will of June 8, 1882, on the ground that these four documents together constituted the true and complete testamentary dispositions of William White, deceased.

The statement of claim (par. 4) further alleged that "on the 27th day of September, 1895, one of the plaintiffs, Charles Francis Martelli, at the request of the testator and in his presence cut out part of the said will dated the 8th day of June, 1882, the testator being at that time under the erroneous belief that the funds comprised in an indenture of settlement bearing date the 6th day of June, 1855, would in consequence be divided amongst the children of his first marriage in equal shares."

The defendants were the widow and her son and two infant daughters, these being the three children of the testator's second marriage. The widow put in no defence; but the three other defendants pleaded that the will of 1882 was not, at the

time of the testator's death, a valid and subsisting testamentary paper, and they denied that the same was not cut or destroyed animo revocandi, or that the testator was under any erroneous belief at the time when the document was cut or destroyed; and alleged that if the testator was then under any erroneous belief, he was not influenced by such belief in directing the cutting or destruction of the document.

The defendants also alleged that the testator revoked the will of 1882 by a will dated September 27, 1895, or, in the alternative, by his last will dated January 1, 1896, which he duly executed with the intention of revoking all previous wills.

The plaintiffs, in reply, denied the allegations in the last preceding paragraph and joined issue upon the rest of the defence, save in so far as it contained admissions.

Upon the testator's first marriage in 1855 a settlement was executed under which certain property was brought in upon trust for the husband and wife for life, with remainder after their death as the survivor should by will appoint, and in default of appointment for all the children of that marriage who should attain the age of twenty-five years, and, if there should be no child of the marriage who by virtue of the trust thereinbefore declared should become entitled to a vested interest, then the trust funds were to be held, as to one-third for the legal personal representatives of the wife, and as to two-thirds for the legal personal representatives of the husband, as if both husband and wife had died intestate and unmarried.

The wife died in 1866, without having joined in exercising the power of appointment contained in the settlement.

Four children of that marriage attained the age of twenty-five and still survived.

The present trustees of the settlement were the first-named plaintiff and John Edward White, a brother of the testator.

In December, 1877, the testator married again, and then executed a will giving all his property to his second wife for her life, with remainder to all his children who should be living at his death, the children of the first marriage bringing into hotchpot any property they might receive under the trusts of the settlement of 1855.

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That will was drawn by Mr. R. H. Gamlen without seeing the settlement, which appeared to have been prepared by a country solicitor, and was then in his or the trustees' hands.

In 1882 the testator, desiring to raise some money under the settlement, and thinking he could do so by appointing the settled funds in favour of one of his children, communicated with his brother, John Edward White, one of the trustees of the marriage settlement, who requested Mr. Gamlen to peruse the settlement; whereupon that gentleman pointed out, by letter to the testator's brother dated January 25, 1882, that the testator's wish was impracticable; that the limitation to issue in default of appointment was void, as it contravened the law against perpetuities, and that the property would devolve as in default of issue; and he advised that the testator should appoint all the trust funds by will among all the children by his first wife, who should attain the age of twenty-one or marry, in equal shares.

The outcome of this advice was the will of June 8, 1882, now in dispute, which appointed the widow sole executrix and trustee, and dealt with all the property of the testator, giving it to the widow for her life, and after her death to all his children who should survive him and attain the age of twenty-one or marry, but so nevertheless that the children by his first marriage should not take any benefit under this will without accounting for and bringing into hotchpot the share or shares appointed to them respectively. It appeared from the evidence of Mr. Charles Francis Martelli, who prepared the will of 1895, and who then held the will of 1882 but was not aware of the contents of the settlement, that the testator had told him that he need not trouble about the latter, as all the property comprised therein would go under the settlement to the children of the first marriage in equal shares. Mr. Martelli thereupon prepared the will of September 27, 1895, by which the testator, after appointing his nephews, William, Earl of Stamford, and the Rev. Henry White and Charles Francis Martelli, to be his executors and trustees, and naming the first two, or the survivor of them, to be, along with his widow, the guardians of his infant children, gave all his property of every kind to his

said executors and trustees, their heirs, executors, and administrators, upon trust to manage the same generally in such manner as to them should appear most advantageous or expedient . . . . and upon trust during the lifetime of the testator's widow to apply the income or any part or parts or the whole of the corpus of his property (the testator's expressed intention being that capital might be resorted to and sunk as well as income if the trustees should think it desirable for the benefit either of the widow or of the widow and all or any to the exclusion of the others or other of his children by both his marriages or of all or any of his children to the exclusion of the widow, as and in such manner as the trustees should in their uncontrolled discretion from time to time think fit). After giving the very fullest indemnity to the trustees, the testator left all the property which should remain at the widow's death upon trust, to divide the capital and income equally amongst all his children living at his decease, who being a son or sons should attain the age of twenty-one, or being a daughter or daughters should attain that age or marry. Then followed the hotchpot clause, which differed in its terms from that in the will of 1882, and ran as follows: "But so nevertheless that my children by my first wife shall not, as between themselves and my children by my second wife or their issue, take any share of capital or corpus under this my will without accounting for and bringing into hotchpot *the share or shares which will have devolved on them respectively under the settlement* made on my marriage with my first wife."

The will of 1896 benefited only the children of the second marriage in the final distribution of the corpus of the property. In other respects the two wills contained identical provisions. Mr. C. F. Martelli in his evidence stated that he was perfectly clear that the testator's intention and belief was that the children of his first marriage should be and were provided for under the settlement.

Mrs. Martelli, a sister of the testator, in the course of her evidence stated that her brother, down to shortly before his death, referred to the settled property as a provision for the first family, whom he left out of any substantial participation in his

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other property, not from any ill-feeling towards them, but because they were thus provided for. He died under the belief that they were so provided for.

No evidence was called on behalf of the defendants.

The will and two codicils made by the testator in 1896 did not contain any exercise of the power of appointment, and none of these documents nor the will of 1895 contained any express revocation of previous wills.

On the death of the testator the trustees of the settlement were requested to pay over the settled funds to the children of the first marriage, and they thereupon took out an originating summons in the Chancery Division.

The executors then raised the point as to the will of 1882 being still valid, so far at any rate as it exercised the power of appointment. The judge (Stirling J.) thereupon directed this question to be brought before the Probate Division.

St. J. G. Micklethwait, for the defendants (other than the widow). If it is a question of intention, the intention of the testator was that the will of 1882 should be done away with. Before he went to Mr. Martelli he had formed the intention of making a new will which should contain a complete disposition of the whole of his property, and his mind was never directed to anything but a total revocation of the will of 1882. The children would all participate as next of kin under an intestacy as to the settled property. The Court cannot read into the new will a clause which the testator left out of it, even if the omission occurred through a mistake; but that is what the plaintiffs now ask the Court to do. In the present case, the testator's act of revocation was not solely referable to the other document; he revoked the will as a whole for family reasons.

[THE PRESIDENT. If the testator thought that the settlement would, by its own force, give the property to the children of the first marriage, and that, therefore, the will of 1882 was useless, under those circumstances would the revocation in 1895 have been absolute? It would have been made under the erroneous impression of the effect of the settlement, and,

therefore, under an erroneous impression as to the document of 1882.]

That would be going further than any reported authority. There was the intention to make a new will, plus the intention to revoke, and he did not intend to appoint by will at all.

Inderwick, Q.C. (*Barnard* and *E. W. Martelli* with him), for the plaintiffs. The hotchpot clause could only refer to the settled property, and shews that the testator intended the first family to get their shares, whether under the settlement or under the appointment. Those children got a vested interest by the appointment made under the will of 1882, subject to their being divested by some act of the testator; and, having made the appointment, he must have been under the impression that he had made it once for all. He then makes a will containing no reference to the settlement or appointment. Thinking the settlement would do what he wished, without the appointment, he causes his signature to be cut out of the will of 1882. That amounts only to a dependent relative revocation.

SIR F. JEUNE, PRESIDENT. I think the result to which I ought to come is that all these documents should be admitted to probate, with the exception of the will of 1895, which, though not expressly, was admittedly revoked by the will of 1896. The will of 1895 does not in terms revoke the will of 1882, and the cutting off of the signature was done under an erroneous belief. The testator intended all along that the children of his first marriage should be provided for, substantially in the way that this was done under the will of 1882, by the exercise of the power to appoint by will the settled funds, or as they might have been benefited under the trusts of the settlement but for the gift over in default of appointment being void for remoteness. The costs of this suit should come out of the estate.

Solicitor for plaintiffs: *C. F. Martelli.*

Solicitors for defendants (other than the widow): *Gamlen, Burdett & Gamlen.*

H. D. G.

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March 6, 7, 8, 28.

BURDON *v.* BURDON.

(THE QUEEN'S PROCTOR SHEWING CAUSE.)

Divorce—Wife's Petition—Queen's Proctor's Intervention—Wife forced by Husband to earn Money by Prostitution—Separation—Habitual Adultery subsequent to Separation—Husband's former Misconduct conducive to such Adultery—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 31—*Discretion of Court—Decree made Absolute.*

Upon an intervention by the Queen's Proctor after the petitioner had obtained a decree nisi for the dissolution of her marriage on the ground of the adultery and cruelty of her husband, it appeared that he had by his threats and ill-treatment forced her to prostitute herself for his pecuniary benefit, and that she, after she had left him on account of his continued ill-treatment, resorted to other acts of prostitution to supplement her insufficient means of livelihood, and also cohabited for a period of three years with a certain man as his wife :—

Held, that all her subsequent acts were the outcome of the husband's conduct, and that she was entitled to have the decree which she had obtained made absolute; the three years' cohabitation and some other facts, very material to be considered by the Court and such as ought not to have been withheld at the hearing of the petition, being insufficient to bar the wife's claim to have her marriage dissolved on the grounds of her husband's adultery and cruelty, though amply sufficient to warrant and justify the intervention of the Queen's Proctor.

Symons v. *Symons*, [1897] P. 167, discussed.

THIS was the hearing of an intervention by the Queen's Proctor in an undefended suit by the wife for dissolution of marriage, in which a decree nisi had been pronounced.

The petition was filed in March, 1899, by Jane Burdon, seeking to obtain the dissolution of her marriage with Francis Burdon on the grounds of his cruelty and adultery.

In the petition the following paragraphs occurred :—

" 5. That the said Francis Burdon, by persistent threats of personal violence and by continual ill-treatment, cruelty, and starvation, compelled and drove your petitioner, in August, 1889, to obtain money for him by prostitution.

" 6. That from August, 1889, till your petitioner was compelled in March, 1890, to leave the said Francis Burdon on account of his continued gross cruelty and brutality to her, the

said Francis Burdon continued to force your petitioner to obtain money for him by prostitution."

On June 5, 1899, the petition was heard by Bucknill J., the respondent not defending.

The case then presented on behalf of the petitioner was that the respondent, who was proved guilty of adultery and cruelty, had compelled his wife to earn money for him by prostitution (as alleged in paragraphs 5 and 6 of her petition), but that she had left him as soon as she could; had given up the life which he had compelled her to enter upon; and had lived a respectable life for some years before she filed her petition.

The judge, with some hesitation, pronounced a decree nisi, but intimated that the Queen's Proctor's attention would be called to the case.

On November 13, 1899, the Queen's Proctor filed his plea, alleging that several material facts had not been brought to the knowledge of the Court; these material facts being, in substance, that the petitioner had habitually committed adultery with a man named Robert Crosbie, from July, 1892, to November, 1895, at various addresses in Sunderland, at most of which she had lived with him as his wife. Other acts of adultery were also alleged against the petitioner in the Queen's Proctor's plea and particulars.

Rawlinson, Q.C., and *Rowlatt*, for the Queen's Proctor.
Bargrave Deane, Q.C., and *Willock*, for the petitioner.

Cur. adv. vult.

March 28. GORELL BARNES J. (after stating the facts). The substance of the case for the Queen's Proctor was that although it appeared in the petition and in the evidence given upon it that the petitioner had, while with her husband, been forced to lead a life of prostitution and had committed such acts on some further occasions after she had left him, being still compelled thereto by the circumstances in which she found herself, it was not disclosed to the Court at the hearing of the petition that the petitioner had lived in habitual adultery with a certain man (Crosbie) and had committed adultery with

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other persons, but that she had committed only a few isolated acts of prostitution within a comparatively short time after she left her husband.

I think there is no doubt whatever that facts which were material for the Court to consider were not disclosed to the Court at the hearing of the petition. There is no doubt, for instance, that the life which this woman admittedly led with Crosbie was not disclosed to the Court.

With regard to that particular part of the case, the fault for not disclosing it rested, in my opinion, rather with the solicitor who acted for the petitioner than with the petitioner herself. The solicitor gave evidence before me, and he produced a statement made by the petitioner to him, towards the close of which she seems to have stated that she lived with Crosbie for about three years at one of the addresses mentioned in the Queen's Proctor's plea. The solicitor further stated that, when the case came on, he was ill and absent from business; that he could not remember when or why a portion of the petitioner's statement was struck out; but that he considered he was justified in what he had done, because the words which he had used, to the effect that the petitioner continued to maintain herself by prostitution, were stronger than the statement put forward by the petitioner herself when he took her proof. I have come to the conclusion that the solicitor was not actuated by any improper desire; but I cannot refrain from remarking that in these cases it is not for the solicitor to judge whether a statement of one kind or another is the stronger; but, in sending these cases forward, the facts as told by the client should be inserted. In a case of this kind there is a material difference between a statement that a woman was driven to prostitution by her husband and had to continue that life till she could get out of it in some way, and a statement that she lived for three years as the wife of a certain man. If the latter fact had been disclosed when the petition was heard, it might, if considered in a favourable light, have obviated the necessity for this intervention.

The question whether, on all the facts as they now appear, the petitioner ought to have her decree must be determined on

the principles by which this Court is guided in the exercise of such discretion as is vested in it by the Matrimonial Causes Acts. The circumstances which justify the Court in granting a decree in such cases as this must be of some special character and not merely general considerations of whether the conduct of the petitioner may be excused or sympathized with. Now, what is the broad outline of the facts which I have to consider and exercise my discretion upon? There is no doubt whatever that this petitioner was, to say the least of it, the victim of extremely unfortunate circumstances. Her mother died when she was about five years old, her father married again shortly afterwards, and she seems to have led a very miserable existence at home. I do not think it necessary to go through the painful details of that story down to the time when she met her husband. She was turned out of her home by her parents at about the age of twenty, and, in those circumstances, she appears to have met him in the streets. According to her evidence he promised to marry her, and she thereupon went with him, and, after moving about from place to place, was found living with him at the house of a Mrs. Robson, who kept a small grocer's shop and let rooms in Sunderland. The petitioner seems to have tried to get him to carry out his promise. Subsequently Mrs. Robson found out that they were not man and wife, and she also pressed the respondent to marry the petitioner, which he accordingly did on April 6, 1889. Up to that time Burdon seems to have worked and maintained both himself and the petitioner; but shortly after the marriage he stopped doing so, and, taking advantage of the fact that he now had a wife, he compelled her to prostitute herself in order to earn money to support him and herself, the result being that shortly afterwards Mrs. Robson turned them out of the house, and they went to lodge at the house of another woman, to whom the petitioner appears to have told her story, and who advised her to leave the respondent, which she did. This was some time in the year 1890. The position in which the petitioner found herself at that time appears to have been this: her father was in an asylum; her stepmother was in receipt of parish relief; her brother was in poor

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circumstances, but for a short time she stayed with him. The brother's wife taunted her with the life she had led, and ultimately she left her brother's house, being, as she said, unable to stand the taunts any longer. She seems at first to have tried to get work with her needle, was unable adequately to support herself, and then, from time to time, was undoubtedly guilty of acts of prostitution in order, as she said, to obtain money to live upon. In 1892, in the course of that kind of life, she met the man Crosbie. She went to live with him, and continued to do so for a very considerable period—substantially for the time alleged in the Queen's Proctor's plea. During part of that time Crosbie was out of work, and she was again compelled, through the exigencies of the situation, to act as she had done before and earn money by prostitution. At the end of two or three years she fell in with Mr. Dawson. The Queen's Proctor alleges that from 1895 onwards she was living in adultery with Mr. Dawson, and was kept by him for that purpose. The case on the other side is that when the Queen's Proctor intervened Mr. Dawson came forward and was really fighting this case for the petitioner; that he first met her accidentally in the streets, took pity on her, helped her to learn to read and write; and his evidence and that of the petitioner and other witnesses is to the effect that, after one or two lapses, due to Crosbie's influence upon her and some affection which she still entertained at that time for him, she was rescued by Mr. Dawson and has since lived a respectable life and supported herself.

[The learned judge then dealt with the evidence on this part of the case, and said that he found entirely in favour of Mr. Dawson.]

One knows how easy it is for a person to descend in the scale—how very difficult it is to raise such a person out of the mire. I think it is a satisfaction that the efforts of Mr. Dawson have succeeded in the object with which they were undertaken. The result has been that her relatives, some of whom are in a better position, have taken her up and have resumed the ordinary relationship of members of a family towards her. Certain criticisms were passed in the course of the case on

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the conduct of Mr. Dawson in regard to this woman; but the remark made here by a gentleman who had known Mr. Dawson for a long time—I mean the Wesleyan minister of the church to which he belonged—seems to me to summarize the matter very well: "As a matter of discretion, he might have gone about it differently, but, in my opinion, he has acted rightly in this matter." It is always open to misconstruction if a man associates with a woman in such circumstances without taking the precautions suggested by counsel for the Queen's Proctor, and without asking the assistance of his minister. I think it is a great credit to a man when he is found ready to risk false impressions in an attempt to bring a fallen woman to the satisfactory condition the petitioner is in now. Having found then, as I do, entirely in favour of the petitioner and Mr. Dawson on this part of the case, the question for determination resolves itself into whether the petitioner's course of life, down to the time when she was helped by Mr. Dawson, was due to her husband's conduct towards her. Two cases connected with this particular subject were cited to me and are worthy of notice. In *Coleman* v. *Coleman* (1), the Court being satisfied that the wife, who had obtained a decree, had led a life of prostitution contrary to her own wish or desire and in consequence of coercion, exercised its discretion in her favour and dissolved her marriage. But in that case there was no continuance of the life of prostitution after the petitioner left her husband; and the whole of the acts of which she was guilty were directly the result of the husband's conduct towards the petitioner at the time. Another case quoted to me was *Symons* v. *Symons* (*the Queen's Proctor intervening*). (2) In that case the wife had been treated with gross cruelty by her husband, who was also guilty of acts of adultery and left his wife in 1870. She heard nothing of him till 1879, when she learnt he was at Burton-on-Trent; but I think the learned President (Sir F. H. Jeune) was not satisfied that she could not have learnt that he was alive if she had chosen to do so. In 1887, when out of work and in want, she made the acquaintance of a man and soon after went to live with him, and

(1) (1866) L. R. 1 P. & M. 81. (2) [1897] P. 167.

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continued to do so until the year 1892, after she knew for certain that her husband was alive.

I only propose to read the last paragraph of the judgment, which is as follows: "On principle, there appear to me to be strong reasons for holding that such wilful neglect or misconduct by a husband should constitute matters, possibly not always conclusive, but fit to be taken into consideration in exercising the discretion whether a divorce shall be granted against him. To hold otherwise would be to allow him to profit by his own wrong; nay, more, it would make the law represent to him that he may escape the penalty of his own misdoing, if only he adds one dishonour to another, and degrades his wife to his own level by any neglect short of connivance, or any misconduct short of compulsion. For these reasons I think that in the exercise of my discretion I ought to make absolute the decree nisi in this case. I need hardly say that the Queen's Proctor was fully justified in bringing the case before the Court, and there will be no order as to costs."

It only needs to contrast the set of facts in that case with the set of facts in the present instance, to see that that case was much stronger in favour of the petitioner than the present one is. The principal point made here by the Queen's Proctor was substantially that from the time when Burdon left his wife, the life which this woman led was led voluntarily by her, and was led, therefore, under such circumstances that it was of her own free will and was not due in any way to the misconduct of her husband. It was further said that her relatives, though poor, could have helped her, as they, in fact, did; and, in a sense, her leaving them was a voluntary act on her part. But it seems to me that one ought to take a broader view of the case, and that one ought not to look so minutely into the details, especially having regard to the decision in *Symons* v. *Symons*. (1) Looking at this petitioner's surroundings and position and at her husband's conduct towards her, it seems to me that the true and correct view to take of this woman's life, down to the time when she was pulled out of the mire into

(1) [1897] P. 167.

which she had fallen, is that it was a continuing result of her husband's misconduct, and that, therefore, his misconduct conduced to all that took place from the time she left him, as it certainly did directly cause what took place while she still remained with him.

It is most difficult, to say the least of it, for a woman who has been sent down on the downward path to retrieve herself. As an instance, see how very difficult it was for Mr. Dawson, after he had come upon the scene, to extricate this unfortunate woman, who does not seem to have been naturally vicious, from the entanglement into which she had fallen. I hold that all she did was the result of her husband's misconduct, and, now that all the facts are before the Court, I find that sufficient cause has not been shewn to justify me in withholding the decree, which will, therefore, be made absolute in due course.

As, however, the case was one in which the intervention was not merely justified, but was the natural consequence of the Queen's Proctor's investigations, there will be no order as to costs.

Solicitor for petitioner: *S. Gissing Skelton, the Queen's Proctor.*

H. D. G.

Considered. LAND *v.* LAND. [1949] P. 405

Explained and distinguished. LAND *v.* LAND. [1949] 2 All E.R. 218.

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Dec. 4, 11.

PICKAVANCE *v.* PICKAVANCE.

Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39)—*Husband's Appeal—Effect of Withdrawal of previous Summons—Technical Objection not taken in Court below—Appeal Allowed—Wife's Costs—Practice.*

The withdrawal of a summons under the Summary Jurisdiction (Married Women) Act, 1895, has the effect of putting an end to the complaint in respect of which it is issued, and, after the withdrawal, no fresh summons can be issued upon the same cause of complaint.

A ground of objection, however technical, is not waived by the omission to take the objection on the hearing of a summons under the Act, but where such an objection is taken by the husband for the first time on the hearing of an appeal and is allowed, the wife (respondent) will be allowed her costs of the appeal.

THIS was the appeal of the husband, George Pickavance, asking that an order, made on November 5, 1900, by a court of summary jurisdiction sitting at St. Helen's, in Lancashire, whereby, after a finding that the appellant was guilty of persistent cruelty to his wife, Ellen Pickavance, and by such cruelty to her had caused her to leave and live separate and apart from him, it was ordered and adjudged that the wife should be no longer bound to cohabit with her husband, and that he should pay to her a weekly sum of 15*s.* and costs, should be wholly set aside, or alternatively that the weekly allowance should be reduced, or that the complaint should be remitted to the justices.

The grounds alleged in the notice of appeal were :—

(1.) That the complaint had not been made within six months from the time when the subject-matter of the complaint arose within the terms of the Summary Jurisdiction Act, 1848, s. 11, as referred to in the Summary Jurisdiction (Married Women) Act, 1895, s. 8.

(2.) That the sum of 15*s.* was excessive and improper.

(3.) That there was not any lawful or sufficient information or evidence to warrant, support, or justify the order.

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The information upon which the order was made was sworn on October 30, 1900.

Previously to this, namely, on June 26, 1899, and on September 25, 1899, two similar informations had been sworn by the wife, simply alleging in general terms that the husband had been guilty of persistent cruelty to her and thereby caused her to leave and live separately and apart from him.

The first summons was dismissed with a suggestion from the justices that the wife should make another effort to live with her husband. The second summons was issued after she had made the suggested effort, and was withdrawn without being heard.

R. H. Pritchard, for the appellant. The complaint was not made within six months, and therefore the order was wrong. The fact of cruelty is not disputed, but the parties had not been living together for fourteen months before the order for separation was made. There was not sufficient evidence of means to justify the order for maintenance.

Bateson, for the respondent. The objection as to time ought to have been taken in the Court below and should not now prevail. One complaint was made and the justices suggested that she should go back to her husband, and she did so. He again assaulted her, and a second summons was taken out on September 25, 1899. That was not proceeded with—it was withdrawn. Before that, she had not been living with him for about fourteen months. The justices could have issued a fresh summons in respect of the matters which were the cause of the former complaint. The withdrawal of the second summons did not finally dispose of the cause of complaint.

The Act of 1848 (1) only says that the complaint shall be made within six months: there is no provision, either there or in the Summary Jurisdiction (Married Women) Act, 1895, s. 8, that the summons shall be heard within six months after the ground of complaint has arisen. The wife complied with s. 11 by making her complaint, as she did, on September 25, 1899, and there is nothing in either of the Acts to limit the power of

(1) The Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11.

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the justices. If the contention on the other side were that the matter was res judicata, that point, not having been taken in the Court below, could not now be raised by the appellant. The note of the clerk to the justices is silent as to any technical objection, and an affidavit is now tendered to shew that none was taken.

[After some discussion the affidavit was admitted, and shewed that before the case was opened before the justices the solicitor for the complainant inquired whether there were any technical objections, and that the solicitor for the husband said that there were none and that he might go straight to the facts.]

There is no authority which covers the present case. The nearest one is *Reg.* v. *Fletcher* (1), where upon a conviction for perjury alleged to have been committed on the hearing of a bastardy summons, the objection that the justices had no jurisdiction was held waived because not taken in the Court below. If, in the present case, it would have been open to the justices to issue a fresh summons on the ground of the old complaint after the withdrawal of the second summons, then the objection now taken is wholly formal and technical—one which ought to have been taken in the Court below, and which has been waived because it was not then taken.

[GORELL BARNES J. In the case you cite, the justices had jurisdiction; here, they had no power whatever to make any order except upon complaint made within six months.]

It would be a cruel injustice to stretch the law against this woman and cause her to lose her order. In the absence of any decision covering the point, the law ought not to be stretched by this Court against her.

[GORELL BARNES J. My strong impression is that the whole complaint was dropped, and could not be revived after the withdrawal of the second summons.]

Then the argument would turn upon the question of res judicata. If the matter were not res judicata, why should the complainant not have a fresh summons? There is nothing to prevent a magistrate issuing several summonses in respect of one complaint. That is done constantly, and by different magis-

(1) L. R. 1 C. C. R. 320.

trates, under the Bastardy Acts, and there is nothing to shew that if a wife withdraws a summons she abandons the complaint upon which it was grounded.

R. H. Pritchard, in reply. The point as to jurisdiction was raised by Gorell Barnes J. in *Ellis* v. *Ellis* (1), and there is nothing in the report to shew that it was taken in the Court below. In *Medway* v. *Medway* (2) the case was sent back to the justices, although the point raised had not been taken in the Court below. It is against all principle that a person should take out a summons, then withdraw it, and afterwards obtain a fresh summons on the same ground of complaint. The clerk to the justices says, "it was allowed to be withdrawn."

SIR F. JEUNE, PRESIDENT. I have grave doubts, I confess, on the question raised as to the effect of the withdrawal of the summons; but, as at present advised, it seems to me that the withdrawal put an end, not merely to that particular summons, but to the complaint upon which it was founded. I should, however, like to take time to consider the point further.

Cur. adv. vult.

Dec. 12. SIR F. JEUNE, PRESIDENT. We thought we would take time to consider our judgment, because it seemed to involve the principle whether the withdrawal of a summons amounted to a complete withdrawal of the complaint so that it could not be proceeded upon.

There seems to be no direct authority on the point; but, after considering it, I am clearly of opinion that the effect of the withdrawal of the summons in this case was to put an end to the complaint; and, the first summons having been withdrawn, that it would not be practicable to found a fresh summons upon the same complaint.

In the present instance, however, I do not know that it is necessary to go as far as that, because there was, in fact, a subsequent complaint alleged by the wife, and therefore,

(1) [1896] P. at p. 255. (2) [1900] P. 141.

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whether or not, as a matter of principle, the withdrawal affected the first complaint, in this case I have no doubt that the subsequent second complaint was the only one that was acted upon; and that was out of time.

It is to be remembered as a very important element in these cases, that the withdrawal of a summons can only take place by leave of the justices or magistrate: a complainant cannot put an end to a criminal proceeding except by leave of the Court, and if that leave is given and the summons is withdrawn that amounts to a consent by the Court; and that involves the obvious effect that the complaint upon which the summons was founded necessarily falls to the ground. The Court, having once given its consent to the withdrawal, cannot be competent to revive it again by issuing a fresh summons on the same ground. As to costs, the position is that the husband did not take the point in the Court below as to being out of time. It is true he takes it here and succeeds. Under these circumstances I think the wife must have her costs on the appeal.

GORELL BARNES J. I agree.

Solicitor for appellant: *W. N. Ellen, for Albert Edward Tickle, St. Helen's, Lancashire.*

Solicitors for respondent: *Charles Russell & Co., for H. L. Riley, St. Helen's, Lancashire.*

H. D. G.

In the Matter of a PROPOSED PETITION FOR JUDICIAL SEPARATION. *Ex parte* MRS. JOSEPHINE BEECHAM.

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Dec. 14.

Divorce—Practice—Affidavit in verification of Petition—Proposed Petitioner for Judicial Separation an Inmate of an Asylum—Refusal by Commissioners in Lunacy to authorize access by Solicitor and Commissioner for Oaths—Motion—Order forthwith.

A married woman, confined in an asylum, gave instructions to her solicitor to institute proceedings against her husband for judicial separation, and the solicitor attended with a commissioner for oaths, in order to obtain from the proposed petitioner the necessary affidavit in verification of the petition, which had been approved and signed by her previously.

The superintendent of the asylum, acting upon printed instructions purporting to be signed by the secretary and addressed from the Office of the Commissioners in Lunacy, refused to allow the solicitor and commissioner for oaths to see the proposed petitioner, and, upon application being made by the solicitor to the Commissioners in Lunacy, they upheld the refusal of the superintendent.

The Court, upon motion, and upon affidavit proving notice, made an order, the Commissioners in Lunacy having notice and not opposing, that the Commissioners should forthwith authorize the superintendent of the asylum to permit the solicitor and commissioner for oaths to have access to the proposed petitioner.

This was a motion by special leave on the ground of urgency for an order against the Commissioners in Lunacy, "that they do forthwith authorize Dr. Bailey, the surgeon of St. Andrew's Hospital, Northampton, to permit a commissioner for oaths and Mr. Briggs, the representative of Messrs. Arnold & Henry White, of 12 and 14, Great Marlborough Street, London, solicitors for Mrs. Josephine Beecham, to have access" to that lady, who was an inmate of St. Andrew's Hospital, Northampton.

In February, 1899, Mrs. Beecham developed such great mental excitement that her husband invoked the assistance of a justice of the peace, and obtained a certificate that she was of unsound mind.

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She was thereupon removed to and had since remained in the above-named hospital, under the care of the superintendent, Dr. Bailey.

Mrs. Beecham had subsequently received certain information, and thereupon wrote a letter to her solicitors, which was conveyed to them by her son.

The solicitors then prepared a petition for judicial separation, and Mr. Briggs, their managing clerk, accompanied by a commissioner for oaths, attended at the asylum on December 11, 1900, for the purpose of obtaining from the proposed petitioner the necessary affidavit in verification thereof, pursuant to rule 2 of the Rules and Regulations in Divorce and Matrimonial Causes (1865).

The proposed petition and affidavit had already been signed by her.

The superintendent refused the request of the clerk to be allowed to see Mrs. Beecham, and handed to him a printed circular letter, addressed from the Office of Commissioners in Lunacy, and purporting to have been signed by the secretary. (1) This, the superintendent stated, was his authority for refusing to allow the commissioner to administer the oath to Mrs. Beecham, and he wrote to the office explaining the

(1) The circular was in these terms: "The Commissioners in Lunacy desire again to call the attention of superintendents of lunatic asylums and hospitals, and proprietors and managers of licensed houses, to the subject of the execution or signature of documents affecting the property or income of patients detained under reception orders as insane.

"While it is no part of their duty to determine the general question of the effect or validity of documents so signed or executed, the Commissioners are of opinion that superintendents, proprietors, and managers, while in charge of persons of unsound mind, ought not, in any circumstances, to permit, or knowingly afford facility for, but ought, on the contrary, to prevent, the execution or signature by any such person of any document, other than a will or codicil, affecting his or her property or income. They except the case of a will or codicil, because testamentary dispositions made during lucid intervals by persons of unsound mind are held to be valid; and they are always open to be contested before being rendered operative by probate.

"Where it becomes necessary to deal with the property or income of a person of unsound mind, while under detention as such, or with property not his own, but vested in him as a trustee or otherwise, resort should be had to the Lunacy Acts, 1890, 1891, or other statutes applicable to the circumstances."

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circumstances, the result being that the Commissioners in Lunacy indorsed the action and refusal of the superintendent.

Leave having been applied for and obtained, short notice of motion was served upon the Commissioners in Lunacy, but they did not appear, and submitted to any order the Court might be pleased to make.

Bargrave Deane, Q.C. (*Hans Hamilton* with him), in support of the motion, asked that the order, if made, should be drawn up forthwith, in order to save extra expense which might be incurred in regard to service of the petition.

THE PRESIDENT (SIR F. H. JEUNE). I have no hesitation in making the order asked for in terms of the notice of motion. It is clear that the lady and her advisers must be afforded the necessary facilities to enable the requirements of the Act (1) and Rules (2) to be complied with and to bring the case properly before the Court. The registrar will draw up the order to-day. I hope there will be no further difficulty, and that it will be complied with as soon after service as possible.

Solicitors: *Arnold & Henry White.*

(1) The Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 41, provides that, "Every person seeking a decree .... of judicial separation .... shall, together with the petition .... for the same, file an affidavit verifying the same so far as he or she is able to do so, and stating that there is not any collusion or connivance between the deponent and the other party to the marriage."

(2) Rule 2 (Rules and Regulations, December 26, 1865) is as follows: "Every petition shall be accompanied by an affidavit made by the petitioner, verifying the facts of which he or she has personal cognizance, and deposing as to belief in the truth of the other facts alleged in the petition, and such affidavit shall be filed with the petition."

H. D. G.

1901
Jan. 15, 16.

THE MOURNE.

Admiralty—Collision—Steering Rules—Sound Signals—"Taking any Course authorized or required by these Rules"—Regulations for Preventing Collisions at Sea, 1897, *art.* 28.

The plaintiffs' steam vessel, after giving a prolonged blast on her whistle, left a dock entrance in the Mersey under easy starboard helm, and—whilst continuing to round under that helm in order to bring up alongside a wall a short distance further up—came into collision with the defendants' downcoming steamer. It was alleged on behalf of the defendants that those in charge of the plaintiffs' vessel should have indicated that she was directing her course to port by giving two short blasts of her whistle in accordance with art. 28 of the Regulations for Preventing Collisions at Sea, by which, "when vessels are in sight of one another, a steam vessel under way, in taking any course authorized or required by these rules, shall indicate that course by" the appropriate signal:—

Held, by Sir F. H. Jeune P., that the rule was not applicable, as the starboard action of the helm began before leaving the entrance, and, when the other vessel was in sight, the plaintiffs' vessel was not, with reference to that other vessel, taking a course authorized or required by the rules.

Cases in which the rule would apply considered.

ACTION of damage by collision.

The plaintiffs were the owners of the *Bengal*; the defendants were the owners of the *Mourne*.

The case is reported only on the question of the meaning of the words "taking any course authorized or required by these rules" in art. 28 of the Regulations for Preventing Collisions at Sea, 1897. (1)

The facts, so far as material, were shortly as follows:—

On October 17, 1900, about 6 A.M. the *Bengal*—a steam flat

(1) Regulations for Preventing Collisions at Sea, 1897: "Sound signals for vessels in sight of one another."

Art. 28: "The words 'short blast' used in this article shall mean a blast of about one second's duration."

"When vessels are in sight of one another, a steam vessel under way, in taking any course authorized or required by these rules, shall indicate that course by the following signals on her whistle or siren, viz.:—

"One short blast to mean, 'I am directing my course to starboard';

"Two short blasts to mean, 'I am directing my course to port';

"Three short blasts to mean, 'My engines are going full speed astern.'"

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of 117 tons register, with engines of 20 horse-power nominal, a crew of three hands, and carrying the regulation lights—left the north entrance to the Salisbury Dock in the Mersey intending to bring up alongside the wall on the same side of the river which runs to the Clarence half-tide dock. The wind was south-easterly light, the weather overcast with some haze, and the tide about high water slack.

As the *Bengal* was leaving, under easy starboard helm, those in charge of her blew one prolonged blast on the whistle, and then observed, about two points on their port bow, and about 400 yards off, the masthead and green lights of—and momentarily a glimpse of the red light of, and at the same time heard a two-blast signal from—the *Mourne*, a screw steamship of 228 tons gross register, engines of 45 horse-power nominal, and a crew of eight hands, with a cargo of coal from Garston to Newry, heading down the Mersey at about 7 knots, well over to the east side of the channel. The *Bengal* continued swinging under her starboard helm and brought the green light of the *Mourne* on to the starboard bow, so that the vessels would have passed starboard to starboard; but the *Mourne* ported, thereby opening her red light broad on the starboard bow, and, though the engines of the *Bengal* were put full speed ahead, the two vessels came into collision, the stem of the *Mourne* striking the starboard side of the *Bengal*, and doing her so much damage that she shortly afterwards sank.

On behalf of the defendants, the owners of the *Mourne*, it was contended, inter alia, that the masthead and red light seen by the *Mourne*, as the *Bengal* was leaving the dock, indicated that that vessel was crossing the river on to her proper side, and would pass the *Mourne* port to port, and, therefore, those in charge of the *Mourne* ported so as to pass under the stern of the *Bengal*; but the *Bengal* starboarded her helm, and neglected to indicate that course by two blasts of the steam whistle in accordance with art. 28 of the regulations.

For the plaintiffs it was contended that, as the *Bengal* was always under a starboard helm, she was not, when in sight of the *Mourne*, taking "a course authorized or required by the rules," and, therefore, the two-blast signal was not necessary.

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Aspinall, Q.C., and *Alex. D. Bateson*, for the plaintiffs, the owners of the *Bengal*.

Baden-Powell, Q.C., and *Dawson Miller*, for the defendants, the owners of the *Mourne*.

THE PRESIDENT (SIR F. H. JEUNE). It is clear that the object of the *Bengal* was to come out of dock, and making a turn as sharp as possible under the action of her starboard helm, to get to the place to which she wished to go; but those in charge of the *Mourne* say that the *Bengal* went further out into the river, and having got into the position of being practically end on, was then seen first on one bow and then on the other, as if under the influence of bad steering. That is a broad issue of fact. Which story is true?

[After examining the evidence as to the position of the *Mourne* in the river, as to her speed, and as to her look-out, the learned judge continued:—]

I think the story of the *Bengal* is true, and that the *Mourne*, coming down the river close to the wall, was not being carefully navigated, and having starboarded for some reason and blown a two-blast signal, she then, with the *Bengal* on her starboard bow, ported just before the collision, and perhaps gave a single blast, the result being that she ran into the *Bengal*, striking her on the starboard side practically a right-angle blow. I have no doubt that that was what happened, and that the *Mourne* must be held to blame, although I am not able to say what her real motive was in so acting. That, to my mind, really determines the case.

I must, however, consider the charges made against the *Bengal*, apart from the main facts of the case. It is said that she ought to have stopped, instead of which, when the collision became imminent, she went on at full speed. That is undoubted. It is also said she ought to have given a two-blast signal at some time after altering her helm. With regard to going on at full speed instead of stopping, that is a matter of navigation upon which I have consulted the Elder Brethren. The obligation under the regulations of 1897 is not the same as it used to be. The obligation now is to stop, if necessary, and I am

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advised by the Elder Brethren that the action of the *Bengal* was, on the whole, the best in the circumstances that could have been taken. Placed in a position of great difficulty, and near to the wall on the one side, and with this vessel coming down upon her on the other, her only chance of safety was to go ahead as fast as she could. There was a chance of her being able to avoid the collision if she could get across the bows of the *Mourne*, and that she nearly did so is clear, because she was struck a considerable distance from her stem.

The other point is somewhat more difficult, because it turns upon the construction of art. 28 of the Regulations for Preventing Collisions at Sea. Under that article, "when vessels are in sight of one another, a steam vessel under way, in taking any course authorized or required by these rules, shall indicate that course by the following signals on her whistle or siren, viz. . . . . two short blasts to mean, 'I am directing my course to port' . . . ."

Now, it is said that the *Bengal*, when she was in sight of the *Mourne*, was a steam vessel under way in sight of another, and, in taking the course she did, ought to have indicated that course by two blasts; but, on considering the wording of the rule, I am of opinion that it does not apply to the circumstances of this case. In the first place, the view which I take of the facts is that the starboard action of the helm of the *Bengal* had begun at some earlier time before she left the entrance, and as is said in the pleadings, she was coming out "under easy starboard helm." That appears to me consistent with the short voyage she was on, and the object which she had in view, and, therefore, I do not think that any circumstances arose in this case which would have compelled her to give the blasts indicated by the rule. I doubt very much whether, when she started her course, so to speak, the vessels were in sight of one another; so that, when starboarding, she was not taking a course authorized or required by the rules. She was taking a course for the purposes of her own voyage, and which had nothing to do with the vessel approaching. It appears to me, therefore, that the rule does not apply. It would apply where a vessel, being on a course, is found varying

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it or making some alteration of it authorized or required by the rules. For example, if a steam vessel is meeting another end on, and the helm is ported in order to comply with the requirements of the rules then applicable; or to take another case, where a steam vessel has another on her own starboard side and under the circumstances is required to keep out of the way; or again, where a vessel, overtaking another, has to keep out of that other's way, or where a steamship has to give way to a sailing vessel. In all those cases the course is authorized by the rules, and if in complying with the rules the vessel alters her course by the action of her helm, she is required to give notice to the other vessel. These are illustrations of the working of the rule, and it would seem to follow that the rule does not apply to a case where, as here, a vessel is on a circular course which she has adopted before, in order to reach the place she desires to reach, and is keeping on on that course acting the whole time under a starboard helm. Under such circumstances the state of things does not arise in which she should give notice to the other vessel by signals. This view appears to me to be decisive of the point, and I need not pursue the further proposition whether the absence of compliance with the rule contributed, or could have contributed, to the collision. I very much doubt whether it could have done so, because the real cause of the collision was the mistake made by the *Mourne* in porting her helm. In the circumstances of this case it does not appear to me that there was any obligation upon the *Bengal* to give the two-blast signal so as to render her liable for not giving it.

In the result I hold that the *Mourne* is solely to blame for the collision.

Solicitors for plaintiffs, the owners of the *Bengal: Pritchard & Sons, for Batesons, Warr & Wimshurst, Liverpool.*

Solicitors for defendants, the owners of the *Mourne: Thomas Cooper & Co.*

T. L. M.

[IN THE CONSISTORY COURT OF LONDON.]

1900
Nov. 8.

THE RECTOR OF ST. ANNE'S, LIMEHOUSE *v.* THE PARISHIONERS OF THE SAME.

Ecclesiastical Law—Faculty—Grant of Faculty for Erection of Communion Table in Side Chapel—Insertion in Faculty of Proviso reserving Power to the Court to order the Removal of Communion Table so authorized if Ornaments introduced into the Chapel without a Faculty or unlawful Services performed there.

A faculty was granted on the application of the rector of a parish for the erection and use of a second Communion Table in a side chapel of the parish church, though both the churchwardens of the parish and the parish vestry expressed opinions averse to the grant; but the Court directed that a proviso should be inserted in the faculty reserving to the Court, on being satisfied that ornaments other than those sanctioned by the present or any future faculty had been introduced into the chapel or unlawful services performed there, to order the removal of the second Communion Table from the chapel.

THIS was a cause of faculty brought by the Rev. Francis Gurdon, the rector of the parish of St. Anne's, Limehouse, in the county of Middlesex and diocese of London, for the purpose of obtaining a faculty authorizing the removal of three seats at the east end of the south aisle of the parish church of St. Anne's, Limehouse, and the erection there of a second Holy Table similar in fittings and hangings to the existing Holy Table in the chancel of that church.

Aug. 2, 16. On these days the cause was heard before the Chancellor of the Diocese of London (Dr. Tristram, Q.C.).

The petitioner in person moved for the faculty, and together with three other witnesses gave evidence in support of the petition.

No appearance was entered for any opponent.

Cur. adv. vult.

1900. Nov. 8. DR. TRISTRAM. In this case the Rev. Francis Gurdon, rector of St. Anne's, Limehouse, on August 2 last

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applied to the Court to decree a faculty authorizing him to construct in the parish church a side chapel, and to place in it a Holy Table similar in fittings and hangings to the existing one in the chancel of the parish church. Previous to the filing of the petition for the faculty, the proposed alterations had been submitted to a vestry of the ecclesiastical parish of St. Anne's, Limehouse, which was attended by twenty parishioners for its consideration, when Mr. Dee, one of the churchwardens, raised objections to the introduction of a Holy Table in the chapel, which he withdrew on hearing Mr. Gurdon's explanations on the subject. A motion in favour of the application for this faculty was then passed unanimously. But on Mr. Gurdon asking Mr. Dee to sign a petition to this Court for the faculty, he said he would sign it if his co-churchwarden, Mr. Marten, would also sign it. On an application being made to Mr. Marten to sign the petition, he declined to do so until the matter had been brought before the vestry of the civil parish.

It appears that by an old local Act of Parliament (1), the affairs of the old parish of St. Anne's, Limehouse, ecclesiastical as well as civil, had been placed under the control of a select vestry composed of sixty vestrymen taken from the whole parish, and that, although subsequently a great part of the old parish had been subdivided into several separate parishes for ecclesiastical purposes, the churchwardens appointed by the civil parish still continue under the same Act to perform the duties of churchwardens in the old parish church.

A resolution on the subject of the present application was submitted to a civil vestry held on May 10 last, at which twenty-eight vestrymen were present, and twenty-six voted against the introduction of the Holy Table in the chapel, one in favour of it, the remaining one being neutral. Thereupon the churchwardens refused to sign the petition. The vicar on moving for the faculty deposed to the above facts, and stated

(1) See the 3 Geo. 2, c. 17, entitled, "An Act for making the hamlet of Limehouse and part of the hamlet of Ratcliffe, in the parish of St. Dunstan, Stebarheath, alias Stepney, in the county of Middlesex, a distinct parish, and for providing a maintenance for the minister of the new church there."

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that the chief ground of objection taken in the civil vestry to the introduction of the Holy Table in the chapel was, that although they had perfect confidence in him, yet they could not know in what manner a future rector might act in regard to the chapel. It also appeared by the rector's evidence that the population of the ecclesiastical parish was over 9000, that there was accommodation in the church for 1200, that there was early Communion every Sunday morning and on three mornings every week, and that the average attendance at the early Communion was from six to ten communicants, and that it would be of considerable convenience and a saving of expense in the lighting of gas, if they could meet on such occasions in a side chapel instead of in the chancel; and his evidence as to the convenience and saving of expense was confirmed by three parishioners who attended the mid-day Sunday services and mid-day Communion, but not the early services. It appears that Mr. Dee resided in the ecclesiastical parish of St. Anne's, Limehouse, but not Mr. Marten, and that both of them attended the Sunday services in the old parish church. After the meeting of the civil vestry, the vestry clerk, by the direction of the churchwardens and overseers of the parish, forwarded to me a copy of a resolution on this subject passed by that vestry, which was as follows: "That this vestry, having considered the application of the Rev. Francis Gurdon for the vestry's approval of the erection of a second Holy Table in the parish church, does hereby express its entire disapproval of the same, and accordingly opposes the erection of a second Holy Table in the parish church, and further resolves that a copy of this resolution be forwarded to the Chancellor of the diocese and to the Bishop of London."

In consequence of the receipt of the copy of this resolution the registrar, by my directions, gave notice to the vestry clerk, a few days prior to August 2, that the application for the faculty would come before the Court on that day, when I should be prepared to hear any observations or evidence offered in opposition to its being granted on the part of the vestry and churchwardens.

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The vestry clerk, in acknowledging the recept of this notice, stated that the shortness of the notice did not allow the vestry sufficient time to prepare to appear at the hearing of the case. I accordingly, after hearing the evidence of the rector and three parishioners, on August 2 adjourned the further hearing of the case until the next sitting of the Court on August 16, of which the vestry clerk had due notice, and, the vestry having put in no appearance on that day, I reserved my judgment.

Upon the evidence the Court is satisfied that the celebration of the early morning Communion in a side chapel instead of in the chancel of this large church would be a convenience to the clergyman and to the attending communicants, and some saving of expense to the parish, and that upon the evidence it was the general wish of the parishioners of the ecclesiastical parish of St. Anne's, Limehouse, that a Holy Table should be placed in a side chapel for this purpose.

On the other hand, there appears to be an apprehension, and not an unreasonable one, from what has come under my observation elsewhere, that the introduction of a Holy Table in the chapel might facilitate the introduction by some future rector into the chapel of ornaments and of services not sanctioned by law, so as to give it the appearance of one of the side chapels which are common in churches of the Church of Rome.

The question for the consideration of the Court has been whether it could so frame the faculty as to comply with the reasonable wishes of a law-abiding rector and parishioners, and at the same time protect the churchwardens and parishioners from the possible danger apprehended by the churchwardens and civil vestry. And, in the opinion of the Court, these two ends may be attained by inserting a provision in the faculty reserving to this Court, on being satisfied that any ornaments other than those sanctioned by the present or a future faculty have been introduced into the chapel, or unlawful services performed in it, to order the removal of the Holy Table from the chapel. A faculty will issue for the removal of the three seats referred to in the petition at the east end of the south aisle of the church and the erection there of a second Holy Table similar in fittings and hangings to the Holy Table in the

chancel of the church, but subject to the provisions I have indicated. (1)

(1) The faculty subsequently issued from the registry pursuant to the above decision was, so far as material to this report, in terms as follows: ". . . . And whereas our said vicar-general and official principal rightly and duly proceeding on the due execution and return of the said citation, no appearance or caveat having been entered thereto, on the court day of Michaelmas term, to wit Thursday, November 8, instant, having theretofore heard the evidence of the witnesses in support of the said petition, decreed a faculty to issue to the said rector in the terms and subject to the provisions hereinafter set forth. Therefore we, the Bishop of London aforesaid, well weighing and considering the premises, do by virtue of our authority, ordinary and episcopal, and so far as in us lies and by law we may and can, ratify and confirm such decree of our said vicar-general and official principal, and do hereby give and grant unto the Rev. F. Gurdon, the rector of the parish of St. Anne, Limehouse, aforesaid, leave, licence and faculty authorizing the removal of three seats at the east end of the south aisle in the church of the said parish, and the erection there of an Holy Table similar in fittings and hangings to the Holy Table in the chancel of the said church for use when the number of communicants is small: Provided that the east end of the south aisle be separated from the church by a screen so as to form a side chapel, and reserving to our said vicar-general and official principal and his successors the power to order the removal of the Holy Table from the said chapel in the event of any ornaments other than a cross, two candlesticks, and flower vases and back and side curtains similar to those now attached to the Holy Table in the chancel being introduced in the chapel without a faculty or any unlawful service being performed in it. In testimony &c. Dated at London, November 30, 1900 . . . ."

C. F. J.

1900
Nov. 26;
Dec. 3.

In the Goods of HISCOCK.

Probate—Nuncupative Will—Volunteer Soldier—Minor—Wills Act (1 *Vict. c.* 26), *s.* 11—"*In Actual Military Service.*"

The test to be applied, in considering whether a nuncupative will of a soldier is entitled to probate under the 11th section of the Wills Act, is whether, before the will was made, some step has under orders been taken by the soldier in view of and preparatory to joining the forces in the field.

A printer's apprentice, who was a private in a volunteer battalion and resided with his father in Chichester, sent in his name for active service in the war then being waged in South Africa, was certified as fit by the medical inspector, and, pursuant to an order, went into barracks at Chichester, and while there made his will, being at that time under twenty-one years of age. An order was subsequently received from the military authorities pursuant to which he embarked with his regiment, and he died from a wound received in battle:—

Held, that by taking the step of going into barracks with a view to being drafted to the seat of war, he had brought himself within the operation of s. 11 of the Wills Act, and that he was, at the time he made his will, "a soldier in actual military service"; and, consequently, that his will, though made at a time when he was under age, was entitled to probate.

Motion for probate of a nuncupative will.

The deceased, Percy Joseph Hiscock, before he went into barracks was apprenticed to a printer at Chichester and was a private in "G" company of the 2nd Volunteer Battalion of the Royal Sussex Regiment, and not liable to be called up for active service at any time except in case of the invasion, or the apprehended invasion, of the United Kingdom.

In pursuance of instructions received from the officer commanding the said battalion, Captain Gibbings, the officer commanding "G" company, called for the names of men of that company who were willing to volunteer for active service in the war then being waged in South Africa.

In response to the call the deceased (among others) voluntarily offered himself for active service in South Africa, and, in accordance with official orders directing him to proceed to

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Chichester barracks for final approval and equipment before being sent to South Africa to join the battalion on service at the front, he presented himself at Chichester barracks on February 3, 1900, for medical inspection and approval, and he was accepted on the same day, the captain of his company being present at his attestation.

On February 19, he with the other volunteers assembled at Chichester barracks, and remained in barracks, except when on short leave of absence, until he left for South Africa.

The final order for embarcation was received at the Chichester barracks on March 2, 1900, and the deceased embarked on March 10, 1900, at Southampton on board the *Tintagel Castle* bound for South Africa.

Two days before he sailed he made his will, being at that time under the age of twenty-one years.

He came of age in May, 1900, and died on July 27, 1900, at Vaal Krantz, in South Africa, from the effects of a wound received in battle at Retief's Nek.

The only property of the deceased consisted of a policy of assurance for 250*l.* upon his own life, a small sum due for arrears of pay, and personal effects not exceeding 5*l.* in value.

The foregoing facts were proved by the affidavits of the deceased's father, supplemented by that of Captain Gibbings; the Court having adjourned the motion for the applicants to adduce evidence as to dates and the circumstances under which the deceased went into barracks.

W. Wills, on behalf of the executors named in the will, moved for probate. In *Drummond* v. *Parish* (1) the words "in expeditione occupati" or "in expeditione" were narrowed down to the meaning "on an expedition." Sandars, Hunter, Moyle, and other text-writers have all agreed to translate those words as equivalent to "on actual service." By going into barracks the testator took a step which brought him within the words of s. 11 of the Wills Act, "in actual military service." Whether such a step has been taken or not

(1) (1843) 3 Curt. 522.

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is the true test to be applied upon applications for probate of wills under that section. Whether a soldier was inops consilii or not was not the true test, but was rather the motive which led to the original grant of the privilege. [He also referred to *In the Goods of Donaldson* (1), in which the term "soldier" was held to extend to persons in the military service of the East India Company, and *Bowles* v. *Jackson* (2), the judgment in which was, he contended, unsatisfactory.]

THE PRESIDENT (SIR F. H. JEUNE). This question is one which I certainly should have desired time to consider, were it not for the fact that I have had recently more than one opportunity of forming a clear idea of the principle that ought to be applied to it, in construing the 11th section of the Wills Act (1 Vict. c. 26). The Court has not so much to consider what the reason for the passing of that section was, as to construe the actual words of the section itself, which are "that any soldier being in actual military service . . . . may dispose of his personal estate as he might have done before the making of this Act." I am inclined to the view that the reason and principle underlying those words are the same as prevailed under the Roman law, namely, that a soldier in the circumstances mentioned, or a sailor who is actually at sea, is, possibly, not altogether, but certainly to a great extent, inops consilii, and therefore not in a position to make his will in the form required of persons in ordinary circumstances. I quite agree that it is not right to consider, in individual cases, whether the person whose will is in question was inops or not; because there might be cases where a man could not be said to have been inops but who would yet come within the words of the Act. It is quite conceivable that a man might be on active service in South Africa at the present time and yet have at his elbow a friend capable of advising him as to the making of his will. Such a man could not be said to be inops consilii; but he would be unquestionably within the words of the 11th section.

(1) (1840) 2 Curt. 386. (2) (1854) 1 Spinks' Ecc. & Adm. 294.

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In *Drummond* v. *Parish* (1) this section was for the first time minutely considered and its construction discussed in the Prerogative Court of Canterbury. Sir Herbert Jenner Fust, in the course of his elaborate judgment, commenting on the admitted fact that the principle of the section was borrowed from the Cival law, refers to the preface to the life of Sir Leoline Jenkins, and points out (2) "that he (Jenkins) claimed to himself some merit for having, during the preparation of the Statute of Frauds, obtained for the soldiers of the English army the full benefit of the privileges of the Roman army; therefore I think it quite clear that the principle of the exception was borrowed from the Civil law; and that in order to ascertain the extent and meaning of the exception the Civil law may be fairly resorted to." Towards the end of his judgment, Sir H. Jenner Fust states the conclusion he had arrived at, in the following words (3): "Being of opinion from the result of the investigation of the authorities, that the principle of the exemption, contained in the 11th section of the Act, was adopted from the Roman law: I think it was adopted with the limitations to which I have adverted, and that, by the insertion of the words *actual military service*, the privilege, as respects the British soldier, is confined to those who are *on an expedition*."

The question before the Court in that case was a very broad one, because Major General Drummond, at the time when he made the will, was at Woolwich, quartered there as he might have been in any other part of England. There was no war in progress at that time that I am aware of, and, being at Woolwich, he was only on the same service as any other soldier who might be quartered in any garrison town of the kingdom. The argument was put in the broadest way, that a person being in garrison on full pay was a soldier "in actual military service," who was liable to be called upon at any moment for active service; and that he was as completely, to all intents and purposes, in the actual service of her Majesty, as if he had been in command of, or serving with a British regiment

(1) 3 Curt. 522. (2) 3 Curt. at p. 531.
(3) 3 Curt. at p. 542.

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on foreign service. It was on that broad ground that the matter was discussed, and very great reliance was properly placed on the Roman law, which took the view that a soldier, in order to be entitled to make an informal will and to have that will upheld, must have been in expeditione — on an expedition—at the time when he made it. The meaning of that was, I take it, that he was employed on actual military service—that there must be a state of war, to begin with, and that he must be in some place for the purposes of that war.

The Roman law and the decision I have referred to leave it still open to ask: What is the meaning of the words "in expeditione," or, as the Wills Act puts it, "in actual military service."

This brings me to the point of considering whether there is any one test which can be fairly applied to the construction of these words. Only two matters can possibly be said to be tests. On the one hand, it may be argued that as soon as orders are received, the soldier becomes on "actual military service." I think it must be assumed, in the first place, that a state of war exists, with which the soldier is, or may be connected; but, assuming such a state of war to exist, the question arises, when, or how soon does the soldier become on actual military service? If he remained in barracks, he could not be so considered. One test that might be looked at is: Had he received orders to go? Was his battalion or regiment under orders for foreign service? My impression is, however, that this test would be too wide, because the word "actual" has to be taken into account.

Then there is the other test, which commends itself to me as the more correct one to be applied, and which is substantially the one which counsel in the present case has asked me to adopt, namely, had the soldier done something—had he taken some step at the time when he made his will, to bring himself within the words of the section. This brings us very close, if, indeed, not actually, to the same point as what the Romans meant by "in expeditione," for when a Roman soldier did anything towards fighting the enemy, he would have been

considered, under the law of his time, as being "in expeditione."

In saying, as I do, that this is the test which commends itself to my mind as the correct one, I am not aware that it has ever been actually laid down by any judicial authority; but, on the other hand, I do not know of any reported case that is against it.

Bowles v. *Jackson* (1), when examined, appears to me to bear out this test, because the officer in that case, although under orders for active military service, had not actually set out; and the learned judge (Sir John Dodson) uses these words (2): "What might have been the case if he had actually set off it is not necessary for the Court to consider." I cannot help thinking that this is the true test to be applied in all these cases—some step taken towards joining the forces in the field. The step may be a small one, both as regards place and time. In case of invasion or civil war—both circumstances which were more present to the minds of the persons who framed the laws of this country in the time of Charles II. than they are to the legislators of our own time—the step might be merely that a man was taken from his home to man the walls or defences of his own native town. In the case of invasion, I should imagine, for instance, that a man living at Dover, and who was called upon to go into the fortifications at Dover and to assist in the defence, would have been within the meaning of the term "in expeditione" or "actual military service," although the movement made or step taken by him would be small in point both of time and locality or distance.

The facts in the present case are these. [The learned President stated them, as proved by the affidavits of Captain Gibbings and the father of the deceased, and set forth hereinbefore.]

Now, if the sequence of events had been a little different—if the order to embark had come a little before he went into barracks, and then the order to sail had been given, I should have considered the case to be beyond all doubt. But, after

(1) 1 Spinks' Ecc. & Adm. 294. (2) 1 Spinks' Ecc. & Adm. at p. 297.

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carefully considering the facts as now proved, I have come to the conclusion that the difference is not very material, because he received the order to go into barracks with a view to getting the subsequent order to embark, which was in fact given not long afterwards. Therefore he went into barracks as a first step towards embarcation, and, as I hold, as a first step towards joining the field forces. I am, therefore, of opinion that, by taking that first step of going into barracks with a view of being drafted to the front, he brought himself within the words and meaning of the 11th section of the Wills Act, and that he was then engaged "in actual military service." I therefore grant probate of his will. I may mention incidentally, that, in another capacity, namely that of Judge Advocate-General, I have had some opportunity of discussing this question with the military authorities, and I understand from them that this test, which I have now laid down as the one to be applied in these cases of soldiers' wills, will be recognised by the authorities as reasonable and proper, and as the one which commends itself to the minds of those most nearly concerned with such matters.

Solicitors: *Preston, Stow, & Preston, for Raper, Freeland & Tyacke, Chichester.*

H. D. G.

BECKETT *v.* BECKETT AND JONES.

1900
Dec. 6.

Divorce—Practice—Damages—Verdict for Amount larger than that Claimed in the Petition.

Where in an undefended case damages are assessed at a higher figure than that claimed in the petition, a summons must be taken out by the petitioner (if he desire to amend his claim) asking for leave to amend and re-serve the petition.

The summons should be served upon the co-respondent, who, although not represented at the trial, will be entitled to be heard in opposition to the application.

UPON the trial of a petition by the husband for dissolution of his marriage on the ground of his wife's adultery with the co-respondent, the jury assessed the damages at 400*l.*, which was a larger sum than had been claimed in the petition.

The respondent and co-respondent were not represented at the trial.

Priestley, for the petitioner, asked leave to amend the petition by substituting the figure 400*l.* for the amount of the claim.

THE PRESIDENT. The co-respondent is entitled to be heard upon that. The proper course for the petitioner to pursue will be to take out a summons for leave to amend and re-serve the petition. The summons should be served upon the co-respondent.

Solicitors: *Bower, Cotton & Bower, for Fowden, Newton & Varey, Manchester.*

H. D. G.

1900
Dec. 12.

WALPOLE *v.* WALPOLE AND CHAMBERLAIN.

Divorce—Practice—Death of Co-respondent after Suit Commenced—Motion to Strike out his Name—Order.

When a co-respondent named in a petition dies after the commencement of the proceedings, the right form of application to be made by the petitioner is to strike his name out of the suit.

MOTION by petitioner (husband) to strike out the name of the co-respondent from the proceedings, he having died since the suit commenced.

After the petition had been filed and served upon the co-respondent, he was examined and cross-examined in open Court before Gorell Barnes J. in January, 1900, in view of his departure for the seat of war in South Africa. He was in the 35th (Middlesex) Company Imperial Yeomanry, and died of enteric fever at Harrismith on November 19, 1900.

Inquiries made at the War Office seemed to shew that the information conveyed to the petitioner through the daily newspapers, as to the fact of the co-respondent's death, was accurate, though the military authorities did not quite correctly describe him.

Priestley, for the petitioner, moved to strike out the co-respondent's name. Curiously enough, there is no direct authority on the point. In *Sutton* v. *Sutton and Peacock* (1) what the petitioner now seeks to do was incidentally asked for upon the motion for directions, which then had to be made as to the mode of trial.

GORELL BARNES J. The right course has been taken in this case. I make an order that the name of the co-respondent be struck out of these proceedings.

Solicitors: *Lake, Shaw, Mackenzie & Co.*

(1) (1863) 32 L. J. (P. & M.) 156.

H. D. G.

[IN THE COURT OF APPEAL.]

C. A.
1901
Jan. 16, 17.

BARRY *v.* BARRY.

Divorce—Alimony Pendente Lite—Maintenance and Education of Children—Separation Agreement—Jurisdiction of Court—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 35—*Matrimonial Causes Act*, 1859 (22 & 23 *Vict. c.* 61), *s.* 4.

A wife, having petitioned for the dissolution of her marriage, presented a petition for an allowance by way of alimony pendente lite and for the maintenance and education of the children of the marriage. In answer to this petition the husband alleged that prior to the divorce petition he and his wife had entered into an agreement for separation, by which he had agreed to make her an allowance of 600*l.* a year. The wife denied the existence of the agreement:—

Held, that the agreement (if it existed) would not affect the jurisdiction of the Court under s. 35 of the Matrimonial Causes Act, 1857, and s. 4 of the Matrimonial Causes Act, 1859, to make provision for the maintenance and education of the children, and that the husband must make discovery of his means.

APPEAL against an order of Sir F. Jeune, the President of the Probate Division, directing that two issues should be tried before the other questions in a suit for a divorce.

On July 19, 1900, the wife filed a petition for the dissolution of her marriage, alleging gross cruelty on the part of her husband, and praying also that she might have the custody of the children of the marriage, seven in number, the eldest of whom was seventeen.

On October 5, 1900, the husband issued a writ in the Chancery Division against the wife, claiming the specific performance of an alleged agreement for separation dated March 23, 1900, made between himself and his wife, and claiming also an injunction to restrain her from taking any proceedings for dissolution of marriage, judicial separation, or restitution of conjugal rights, or otherwise committing any breach of the agreement.

The wife commenced a cross-action, by which she claimed a declaration that the alleged agreement of March 23, 1900,

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purporting to be signed by E. J. Stannard (her then solicitor) on her behalf, was so signed without her authority, and was not binding upon her, or in the alternative to have the same set aside and cancelled.

On October 20, 1900, the wife filed a petition in the divorce suit for an allowance to be paid by her husband by way of alimony pendente lite and for the maintenance and education of the children of the marriage.

On November 5, 1900, on the application of the husband, the President ordered that the hearing of the cause should be postponed until after the determination of the Chancery proceedings, and that the alimony proceedings should be stayed until after that determination.

The wife appealed from this order, and on November 14, 1900, the Court of Appeal "ordered by consent that the order of November 5 be discharged, each party undertaking that the hearing of the action and cross-action now pending in the Chancery Division be stayed until after the hearing of the divorce cause or until further order."

On November 26, 1900, the husband made an affidavit in answer to the petition for alimony, in which he denied the allegations therein made as to the amount of his annual income and his property. He said that by a deed dated March 12, 1900, he covenanted to pay to his wife during her life 150*l.* per annum for her separate and inalienable use; that she was living apart from him under an agreement for separation dated March 23, 1900, duly executed by her and his solicitors duly authorized for that purpose, whereby it was provided (inter alia) that she should receive the annual sum of 450*l.*, in addition to the 150*l.* payable under the deed of March 12, and that it was intended by the parties to the agreement that the wife should out of those two annual sums in all respects maintain herself and maintain and educate the children of the marriage. The husband further said that since the date of the agreement he had continued to pay the wife, and was prepared to pay her pending suit, at the rate of 600*l.* a year as thereby provided, and that she declined to execute a deed of separation in accordance with the agreement. The husband submitted that it was

neither just nor equitable that the wife should receive any sum by way of alimony pendente lite or for the maintenance and education of the children pendente lite over and above what was provided for by the agreement. He added that he was perfectly willing to furnish to the Court an affidavit fully setting forth all the annual income and sources of income, and other property to which he was entitled in possession or reversion, if the Court should be of opinion that the wife was entitled pendente lite to go outside the terms of the agreement.

On December 3, 1900, the husband filed his answer to the divorce petition, and thereby denied the allegations of cruelty contained in the petition. He said that the separation agreement of March 23 had been entered into in consideration of the withdrawal of a charge of assault which the wife had brought against him before a magistrate, and he set forth the terms of the alleged agreement as follows: "Agreed between J. H. Barry and Mrs. K. V. M. Barry by their respective solicitors with authority. The charge to be unconditionally withdrawn. Mrs. Barry to live separate from her husband from now under a deed of separation to be settled by the solicitors, and in the event of disagreement by Mr. Inderwick, Q.C., at Mr. Barry's expense. 600*l.* a year to Mrs. Barry, to include the 150*l.* under deed of March inst. Mrs. Barry to have custody of all the children. Mr. Barry to have custody of all or any for four months in the year. As far as possible same terms as to their education, &c., as in deed of October 14, 1898. Trustees to be nominated, one by Mrs. Barry and one by Mr. Barry. Mr. Barry to pay 21*l.* costs. Queen's Gardens house to be given up. Mrs. Barry to have necessary furniture she needs."

This agreement purported to be signed by the wife's then solicitor on her behalf, but she said that she had not authorized him to sign it. The deed of October 14, 1898, referred to in it had been cancelled by mutual consent.

The husband said that he had always been ready and willing to carry the agreement into effect in all respects on his part, and had duly performed the same up to the present time, but that his wife absolutely refused to execute a deed which had

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been prepared in accordance with the agreement, or otherwise to perform the agreement. He submitted that by reason of the agreement the wife was not now entitled to any relief on her petition, but that she was estopped by the agreement from seeking either a divorce or separation on the grounds alleged in the petition or any of them. And the husband prayed—(1.) that the petition might be dismissed; (2.) specific performance of the agreement of March 23; (3.) execution by the wife of the separation deed already prepared in pursuance of the agreement.

On December 4, 1900, the wife issued a summons asking that the husband might be directed within four days to file a further and better answer to the petition for alimony and maintenance, and that in default of such answer the petition might be proceeded with and an allotment made forthwith on the basis thereof.

On December 7, 1900, the wife took out another summons, calling on the husband to shew cause why an order should not be made to strike out so much of the answer to the divorce petition as alleged that the agreement of March 23, 1900, estopped the wife from proceeding on her petition, and also paragraphs 2 and 3 of the prayer of the answer.

On the hearing of these two summonses the President made an order that (1.) the question of the existence of the agreement of March 23, 1900, and (2.) the question whether by reason of that agreement (if any) the wife was not entitled to any relief on her petition, be tried before the other questions in the suit.

Against this order the wife (with the leave of the Court of Appeal) appealed.

A. Beddall, and *H. Durley Grazebrook*, for the wife. The order appealed from is inconsistent with the consent order of November 14. It was practically admitted then, and indeed the learned President had said so, that the separation agreement, if proved to exist, would not be a bar or estoppel to the petition for a divorce. And in *Williams* v. *Williams* (1)

(1) (1866) L. R. 1 P. & M. 178.

Lord Penzance J.O. said (1) "It is plain that the deed (of separation) does not operate as an estoppel"—that is, to a wife's petition for a judicial separation.

At any rate, the agreement (admitting for this purpose its execution and validity) cannot oust the jurisdiction of the Court under s. 35 of the Matrimonial Causes Act, 1857, to make provision pendente lite for the maintenance and education of the children of the marriage. That the power conferred by that section extends to a provision pendente lite is recognised by s. 4 (2) of the Matrimonial Causes Act, 1859. And that the power of the Court is not affected by any previous agreement between the husband and wife is shewn by *Bishop* v. *Bishop*, *Judkins* v. *Judkins*. (3) The husband ought therefore to be ordered to make disclosure of his means, as indeed he offers to do in case the Court should be of opinion that the wife is entitled pendente lite to go outside the terms of the agreement.

Sir E. Clarke, Q.C., *Bargrave Deane, Q.C.*, and *Priestley*, for the husband. The question whether the separation agreement is a bar to the divorce petition ought to be argued before the President. The consent order of November 14 is not inconsistent with this course being taken. The shorthand writer's

(1) L. R. 1 P. & M. at p. 179.

(2) Sect. 35 of the Act of 1857: "In any suit or other proceeding for obtaining a judicial separation, or a decree of nullity of marriage, and on any petition for dissolving a marriage, the Court may from time to time, before making its final decree, make such interim orders, and may make such provision in the final decree, as it may deem just and proper with respect to the custody, maintenance, and education of the children the marriage of whose parents is the subject of such suit or other proceeding, and may, if it shall think fit, direct proper proceedings to be taken for placing such children under the protection of the Court of Chancery."

Sect. 4 of the Act of 1859: "The Court after a final decree of judicial separation, nullity of marriage, or dissolution of marriage, may upon application (by petition) for this purpose make, from time to time, all such orders and provision with respect to the custody, maintenance, and education of the children, the marriage of whose parents was the subject of the decree, or for placing such children under the protection of the Court of Chancery, as might have been made by such final decree or by interim orders in case the proceedings for obtaining such decree were still pending; and all orders under this enactment may be made by the Judge Ordinary alone or with one or more of the other judges of the Court."

(3) [1897] P. 138.

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notes of what took place in the Court of Appeal shew that it was the intention of the Court and the parties that the questions of the validity and effect of the agreement should be decided in the divorce proceedings. Under the circumstances the order of the learned President was the best that could be made when those questions had been distinctly raised by the two summonses. It is the practice in the Probate Division not to inquire into the husband's means upon an application for alimony pendente lite when the parties have previously agreed upon the amount of an allowance to be made by the husband to the wife. That amount is accepted by the Court as sufficient.

Beddall, in reply. No practice of the Court can oust its statutory jurisdiction to make provision for the maintenance and education of children. If the Court is of opinion that the issues of the validity and effect of the agreement should be tried in the divorce proceedings, at any rate the claim for specific performance of the agreement should be struck out of the husband's answer. And those issues should be tried with the hearing of the divorce petition, and not antecedently.

RIGBY L.J., after stating the order appealed from, continued :—The alimony proceedings were peremptorily stopped by the order, because the practice of the Probate Division as alleged is never, upon an application for alimony pendente lite, to go outside an agreement previously entered into by the parties for a separation, and, when there is such an agreement, never to inquire into the husband's means. Mr. Beddall has agreed for the purpose of the application for alimony, and for that purpose only, to admit that there is an agreement for a separation. In my opinion, notwithstanding any practice in the Probate Division (a practice depending, I think, to a great extent upon the circumstance that the proceedings are generally by no means lengthy in point of time), the appellant's counsel have the right to urge upon this occasion any arguments which can properly be brought forward under s. 35 of the Act of 1857 and s. 4 of the Act of 1859 on the part of the children, and inasmuch as there is a submission

by the husband in his answer to the alimony petition to make disclosure of his means, I think he ought to give the proper particulars of his income and property so as to enable the Court to decide what the amount of the alimony pendente lite, including an allowance for maintenance and education of the children, should be.

As regards the question whether the issues as to the existence and effect of the agreement should be tried separately, the existence of the agreement will of course have to be proved, because its existence is admitted only for the one purpose of the alimony proceedings. I do not think that this question or the question of law whether, if there be such an agreement, it would be an estoppel to the divorce petition, ought to be tried separately from the trial of the petition. I do not think we ought to allow the risk to be run of such an issue being brought on appeal and then taken to the House of Lords. Our order, therefore, will be that these two issues be tried simultaneously with trial of the divorce petition. It is certainly not our intention to do anything which would not be perfectly courteous to the learned President; but, after what took place on the former occasion, I do not think the learned President will in any way object to the order which we are now making. I mention this as a matter of courtesy.

STIRLING L.J. I agree with the conclusion of Rigby L.J. [After referring to the consent order of November 14 and to the subsequent proceedings, the Lord Justice continued:—]

I must confess that at first sight it appeared to me that the order now appealed from was inconsistent with the view which was taken of the case when the Court of Appeal dealt with it on November 14. But my view has been modified by a perusal of the shorthand notes of the discussion which then took place.

After reading those notes, it seems to me that it was contemplated by the Court that to a certain extent the existence and effect of the agreement should be a matter for the consideration of the learned judge who is to try the divorce petition, and that therefore the parties are within their rights in setting up the agreement and in inviting the opinion of the

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Court whether it does or does not constitute a bar to the divorce proceedings. I think, however, that in so far as by the husband's answer specific performance of the agreement is asked for, he has gone beyond what was contemplated by this Court. I think the intention was that, although it might be necessary to go into the question of the existence of the agreement in the Divorce Court, still if there came to be a question of its specific performance, that question was reserved to be dealt with in the Chancery action, which was stayed, not finally, but only till after the termination of the divorce proceedings.

I will now express my opinion as to how these pending summonses should be dealt with. First, as to the question of alimony, Mr. Beddall has agreed that for the purpose of that application the existence of a binding agreement is to be assumed, but he says that, under the provisions of s. 35 of the Act of 1857 and s. 4 of the Act of 1859, he is entitled, notwithstanding that agreement, to apply for a provision for the maintenance and education of the children of the marriage. I think that in that contention he is well founded, and that for the purpose of considering the petition for alimony it is not necessary that there should be a preliminary investigation as to the existence of the agreement. In my judgment, therefore, the inquiry as to the husband's means ought to proceed in the usual way.

As regards the question of the effect of the agreement, if it exists, I feel the force of the point made by Sir Edward Clarke, that, in order effectually to determine the legal question, it is necessary that the facts should be first ascertained. Although, however, I do not pretend to any great knowledge of the law on this matter, with which I have not been familiar, I attach great weight to what has been said by the learned President, even although it may be only a dictum, and I am inclined to think that the alleged bar will not be found to be very effective. I do not desire to say more than that. But I am strongly impressed with the delay and difficulty which might arise in case the President should find upon the trial of the preliminary issues that the agreement did in fact exist. The question as

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to its effect might be brought to this Court, and then taken to the House of Lords, and in the meantime the proceedings on the petition for a divorce would be hung up. I think it would be very much better that the questions of the existence and effect of the agreement should be tried together with the other questions which are raised in the divorce petition. I agree in the order which has been proposed by the Lord Justice.

RIGBY L.J. I omitted to refer, as I had intended to do, to the question of specific performance. As to that, I entirely concur with what has been said by my learned brother.

Appeal allowed.

Solicitors: *Booth & Smee; Harcourt, Sons & Rolt.*

W. L. C.

[IN THE CONSISTORY COURT OF CHICHESTER.]

1900 *Aug.* 21.

DAVEY *v.* HINDE AND OTHERS.

Ecclesiastical Law—Faculty—Interest—Parishioner of new Ecclesiastical Parish—Lord Blandford's Act (19 & 20 *Vict. c.* 104), *s.* 15—*Right of Non-resident Ratepayer to promote Faculty Suit—Removal of Illegal Ornaments—Stations of the Cross—Confessional Boxes—Crucifixes—Tabernacles—Holy Water Stoups—Images of the Good Shepherd, the Virgin Mary and the Sacred Heart and St. Joseph—Effect of Sentence of Consecration—Criminal Suits against Churchwardens—Issue of Decree—Costs.*

The tenant of a house within the limits of an ecclesiastical district formed into a separate parish with a new parish church under Lord Blandford's Act, who has his name on the rate-book of the civil parish out of which the separate parish has been formed, and pays the civil parochial rates levied on him, has a sufficient interest to promote a faculty suit for the removal of illegal ornaments set up in the new parish church, notwithstanding that he does not reside in the ecclesiastical district and has become tenant of the house for the sole purpose of qualifying as a parishioner and ratepayer.

A Bishop cannot by a sentence of consecration legalize the retention in a parish church of an ornament which is forbidden by law to be there.

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The following ornaments and things were ordered by the Ordinary to be removed from a parish church as illegal:—

I. ORNAMENTS AND THINGS IN THE CHURCH AT THE TIME OF ITS CONSECRATION.

I. The fourteen Stations of the Cross. II. Three Confessional Boxes. III. A large Crucifix fixed near the pulpit. IV. A Tabernacle on the Communion Table in the chancel before which a lamp was kept burning.

II. ORNAMENTS AND THINGS INTRODUCED INTO THE CHURCH SINCE ITS CONSECRATION.

I. A piece of furniture applicable for receiving Confessions. II. Two Water Stoups for holding Holy Water. III. A Tabernacle on the Communion Table in the side chapel of the church used for the Reservation of the Sacrament. IV. Images representing (1.) the Good Shepherd, on a pedestal at the west end of the church, with candles on each side and a lighted lamp in front; (2.) the Virgin Mary, on a pedestal standing against the chancel screen with candles on each side, vases of flowers, and a lighted blue lamp before it with canopy, crown, and star over it; (3.) the Sacred Heart and St. Joseph, on either side of the Communion Table in the side chapel of the church. V. Several Crucifixes, one over the Communion Table in the chancel, another on the chancel screen, and another with a crown over it over the Holy Table in the side chapel of the church.

The patent appointing the Chancellor of the Diocese of Chichester confers on him jurisdiction to proceed in the absence of the Bishop of the diocese from the Consistory Court of Chichester in all ecclesiastical suits, the decision of which is known by law or custom of the realm to belong to the Ecclesiastical Courts, and finally to decide and determine them without breach of the laws and statutes of the kingdom, "nevertheless first consulting us" [the Bishop of the diocese] "and our successors, and having our consent, in case either party earnestly craves our judgment."

The opponents in a cause of faculty instituted in the Consistory Court of Chichester for the removal of certain ornaments out of a parish church alleged in their answer that before any decision or final determination of the cause, the Bishop of the diocese should be first consulted and his consent had, and earnestly craved his judgment in the premises, and complained and supplicated that the said Bishop should examine and determine the cause in his own proper person in the Consistory Court of the diocese. The petitioner in his reply submitted that the consent of the Bishop prayed for in the answer was not necessary to the hearing and determination of the cause, and supplicated that the said cause might be examined and determined by the Chancellor of the diocese. Subsequently the hearing of the cause took place in the Consistory Court of Chichester.

The Chancellor of the diocese heard the cause sitting alone, the Bishop not being present, and determined it, delivering judgment without con-

sulting the Bishop, and decreeing a faculty to issue for the removal of the illegal ornaments referred to in the petition, holding that the validity of the reservation in his patent in favour of the Bishop was a matter for the determination of the temporal Courts; it being within the province of these Courts alone to decide whether a custom for the Bishop to exercise the right reserved to him by the patent was valid in law.

Semble, the custom in question, i.e., a custom for the Bishop to veto a judgment come to after the hearing of a suit by the Chancellor, would be unreasonable and bad in law and not a legal custom, as no trace of its exercise could be found in recent times or since the Reformation.

Observations as to the institution of criminal suits against churchwardens for the purpose of obtaining the removal of illegal church ornaments.

THIS was a cause of faculty instituted on behalf of George Davey, described in the petition in the suit as of No. 1, Lincoln Cottages, in the parish of the Church of the Annunciation, in the town of Brighton, in the diocese of Chichester; the suit being promoted for the purpose of obtaining a faculty authorizing the removal out of the above-mentioned Church of the Annunciation of certain ornaments alleged to be illegal and enumerated in the petition in the suit, and some of which had been in the church at the time of its consecration, whilst others had been introduced there since its consecration, and without the sanction of any faculty.

The petition was brought in on January 18, 1899, and after alleging that the petitioner was a parishioner and ratepayer in the parish of the Church of the Annunciation, contained in paragraphs 2 to 14 the following statements with regard to the articles and things which were alleged to be, in the opinion of the petitioner, illegal, and to have been illegally placed in the Church of the Annunciation.

2. The pictures commonly called the Stations of the Cross, and being fourteen in number, are displayed on the walls of the church.

3. An image of the Good Shepherd has been brought into the church and placed on a pedestal situate at the west end of the south aisle of the church, with candles on each side, and a lighted lamp in front of the same image.

4. An image of the Virgin Mary has been brought into the church and placed on a pedestal standing against the screen, separating the chancel from the nave, with candles on each

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side of the said image, vases, and flowers, and a lighted blue lamp before it, with a canopy, crown, and star over the said image.

5. There is upon the Communion Table a Tabernacle with a light burning before it.

6. Standing over or above, and in apparent connection with the Communion Table, is a crucifix.

7. Upon a screen separating the chancel from the nave is another crucifix.

8. In the side chapel upon or over the second Communion Table is a second Tabernacle with a light burning before it.

9. On or over the Tabernacle in the side chapel stands or rests a crucifix with canopy and crown over it.

10. There are two images standing on pedestals, one on each side of the Communion Table in the side chapel, representing the Sacred Heart and Joseph.

11. There is a large crucifix fastened on a pillar next the pulpit, facing the south wall of the church.

12. There is a holy water stoup near the entrance to the church from Washington Street.

13. There is a second holy water stoup near the same entrance.

14. There are in the church two Confessional Boxes standing against the south wall of the church, one of which contains a small crucifix, and also a third Confessional Box standing against the south wall of the church, all of which Confessional Boxes are or were lately used for the purpose of hearing confessions.

The petition further alleged that "all the above-mentioned articles and things were liable to be subjected to superstitious uses and naturally conducive to such uses," and concluded with a prayer that a monition might issue to the churchwardens of the church, or that a faculty might be granted to your petitioner, or to such other person or persons as the Court might select, authorizing him or requiring him or them to remove the above-mentioned articles or things from the church.

Appearances to the citation in the suit were entered on behalf of the Rev. Henry Fitzrichard Hinde, vicar, and William

Henry Hammond and William Henry Funhall Littlechild, churchwardens of the church and new parish of the Annunciation, Brighton, and they on or about March 28, 1899, filed their answer in the suit. This answer, in paragraph 1, denied that the petitioner was a parishioner or resident inhabitant of the new parish of the Annunciation, Brighton, and submitted that he had, therefore, no interest cognizable by the Court in the subject-matter of his petition.

The second, third, and fourth paragraphs of the answer pleaded (par. 2) that the Stations of the Cross, the Tabernacle over or upon the principal Holy Table, the crucifix near the pulpit and the three Confessional Boxes referred to in paragraphs 2, 5, 11, and 14 of the petition were in their present places in the church at or before the consecration by Bishop Tufnell, acting for the late Bishop of Chichester, on July 9, 1884, and no licence or faculty was or is necessary for their erection or retention; that (par. 3) all the other articles mentioned in the petition were movable or subsidiary articles, and not structural additions, from time to time placed in the church at the cost of the parishioners or friends of former vicars before the respondent H. F. Hinde was instituted to the vicarage, and could not legally be removed without a faculty, which the Court in its discretion ought not to grant, it being not asked for by the parishioners as a body; and that (par. 4) none of the articles and things mentioned in the petition were illegal or liable or conducive to superstitious uses, and all such articles and things had since their erection been periodically inspected without objection by the Ven. the Archdeacon of Lewes, acting as or on behalf of the Ordinary, the last of such inspections having taken place on or about December 20, 1897. The fifth and sixth paragraphs of the answer were, so far as material in terms, as follows:—

5. The respondents allege and propound that before any decision or final determination of the cause aforesaid the Right Reverend Father in God, Ernest Roland, Lord Bishop of Chichester, should be first consulted and his consent had, and they earnestly crave his judgment in the premises, and humbly complain and supplicate that the said Lord Bishop should

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examine and determine the said cause in his own proper person in this Court.

6. The respondents, lastly, submit that the petition should be dismissed, and that the licence or faculty prayed should be refused with costs.

The petitioner, by his reply, alleged, in substance, that he was a parishioner and ratepayer of the parish of the Annunciation in respect of No. 1, Lincoln Cottages in that parish, and that the submission of the respondents in the second paragraph of their answer as to no faculty being necessary for articles and things in the church at its consecration was wrong in point of law; denied all and every the allegations in paragraphs 3 and 4 of the answer; and as to paragraph 5 thereof, submitted that the consent of the Lord Bishop of Chichester prayed for by that paragraph was not necessary to the hearing and determination of the cause, and humbly supplicated that the said cause might be examined and determined by the Official Principal of the Consistory Court of Chichester.

1900. Jan. 4. The cause came on to be heard at Lewes, before the Chancellor of the Diocese of Chichester (Dr. Tristram, Q.C.), and the hearing was continued on January 5 and 6, 1900. The petitioner and three other witnesses gave evidence orally in support of the petition, and one of the opponents, W. H. Hammond, the vicar's churchwarden, was examined in support of their case. The result of their evidence appears from the judgments. (1)

Dibdin and *Dodd*, for the petitioner. The petitioner, as a ratepayer of the borough of Brighton and the tenant of a

(1) A memorial signed by certain parishioners of the parish of the Annunciation in favour of the articles and things objected to being retained in the church, was, after some discussion, admitted by consent as evidence de bene esse; it being at the same time agreed, with the leave of the Court, that the petitioner should be at liberty to bring in a counter-memorial to be also if brought in admitted as evidence de bene esse.

The following cases were referred to on the question of the admissibility of memorials in causes of faculty: *Nickalls* v. *Briscoe*, [1892] P. 269, 279; *The Vicar of Tetbury* v. *The Churchwardens and Inhabitants of the Parish of Tetbury*, [1892] P. 271, note (2); *The Vicar of Tottenham* v. *Venn*, (1874) L. R. 4 A. & E. 221.

house, No. 1, Lincoln Cottages, a portion of which he himself occupies, within the new parish of the Annunciation, Brighton, has a sufficient interest to enable him to maintain this suit. This is shewn by *Hansard* v. *The Parishioners of St. Matthew, Bethnal Green* (1); *Batten* v. *Gedye* (2), in which last case the owner of property in a parish in respect of which he paid rates was held entitled to sue in the temporal Court as a parishioner though he did not reside in the parish. Moreover, a voluntary church rate in respect of the repairs of the Church of the Annunciation might rightfully be made on the petitioner under 31 & 32 Vict. c. 109, the 6th section of which expressly provides for the making of the voluntary rate by the "inhabitants of any ecclesiastical district in relation to the repairs of the new parish church situated in the district."

[They also referred to Prideaux on Churchwardens, p. 106, 16th ed.; *Fuller* v. *Alford* (3); *Hughes* v. *Lloyd* (4); 6 & 7 Vict. c. 37, s. 9; 58 Geo. 3, c. 45, ss. 13, 73; *Wilson* v. *The Churchwardens of Sunderland.* (5)]

The petitioner having thus a clear right to apply to the Court for a faculty for the removal of ornaments or decorations out of the Church of the Annunciation, it only remains for him to shew that the articles and things objected to in the petition and now in the church are illegal in churches of the Church of England, when the Court would, without doubt, decree a faculty for their removal. The illegality of all the articles and things objected to can easily be shewn. Indeed, it is difficult to conceive any argument in favour of their retention to which the Court would attribute any weight. Most of the articles and things objected to are illegal under the express decisions of this Court or the Court of Arches, and all of them contravene principles of law laid down by the authority of the same Courts, whilst it is immaterial, provided they are so shewn to be illegal, whether they were or were not in the church at the time of its consecration. The altar and cross on the chancel screen in the church of St. Barnabas, Pimlico, objected to in the case of

(1) (1878) 4 P. D. 46, 54.
(2) (1889) 41 Ch. D. 507.
(3) (1883) 10 Q. B. D. 418.
(4) (1888) 22 Q. B. D. 157.
(5) (1864) 17 C. B. (N.S.) 694.

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Beal v. *Liddell* (1), were in that church when it was consecrated, yet they were, notwithstanding that fact, ordered to be removed as illegal by the Consistory Court of London and the Court of Arches, Dr. Lushington, in the Consistory Court, considering that the mere act of consecration was no evidence of approbation of illegal church ornaments, and the Court of Arches holding that no consent of the diocesan could render illegal church ornaments legal: *Westerton* v. *Liddell*. (2) The Judicial Committee of the Privy Council, on appeal, though affirming the decree of the Arches as to the removal of the altar in St. Barnabas, thought it unnecessary to consider the evidence given in that Court as to the consent of the Bishop of London to the presence in the church of the articles and things objected to. To take the articles and things objected to in order. There are in this church, having been there when the church was consecrated, the pictures known as the Stations of the Cross, and it is proved that illegal services have been held in connection with them; but it is not necessary to further refer to these services, as the Stations of the Cross have been decided to be illegal per se: *Clifton* v. *Ridsdale* (3); *The Vicar of St. Mark's, Marylebone Road* v. *The Parishioners of the Same*. (4) The images in the church and complained of in the petition, representing the Good Shepherd, the Virgin Mary, and the Sacred Heart and St. Joseph, have been placed in the church without a faculty; are not architectural decorations, when they would be legal if not liable to be abused by superstitious reverence, but are clearly from their position and surroundings "church ornaments": *Westerton* v. *Liddell* (5); *Phillpotts* v. *Boyd* (6); *Clifton* v. *Ridsdale* (7); *Hughes* v. *Edwards* (8); and not being within the "ornaments" rubric in the Book of Common Prayer, are illegal church ornaments forbidden by law in churches of the Church of England:

(1) (1855) Moore's Special Report, p. 21.

(2) Moore's Special Report, pp. 109, 110.

(3) (1876) 1 P. D. 316, at p. 359; (1877) 2 P. D. 276.

(4) [1898] P. 114.

(5) Moore's Special Report, pp. 28–39.

(6) (1875) L. R. 6 P. C. 435.

(7) 1 P. D. 316, at pp. 351–8.

(8) (1877) 2 P. D. 361.

Westerton v. *Liddell* (1); *Clifton* v. *Ridsdale*. (2) Further, even if contended to be architectural decorations, and not illegal per se, they must on the facts be held illegal as liable to have superstitious reverence paid to them: *Phillpotts* v. *Boyd*. (3) The crucifixes complained of ought to be removed out of the church. They, as well as the images above mentioned, are isolated figures and form no part of an historical representation, as was decided with regard to the reredoses sanctioned in the Exeter Reredos Case and the cases following it: *Phillpotts* v. *Boyd* (3); *Hughes* v. *Edwards* (4); *Reg.* v. *The Bishop of London* (5); and are illegal per se under the decision of this Court in *Kensit and Others* v. *The Rector and Churchwardens of St. Ethelburga, Bishopsgate Within*. (6) As to the Tabernacles. They are obviously in the church to be used for the reservation of the Sacrament, and as the reservation of the Sacrament is clearly illegal according to the view of the Judicial Committee of the Privy Council in *Sheppard* v. *Bennett* (7) and *Martin* v. *Mackonochie* (8), they must be condemned as subserving only an illegal purpose. They are also either unlawful church ornaments not authorized by the ornaments rubric, or fittings of the Communion Tables, liable to be abused by superstitious use and not authorized by law.

[They referred to a dictum of Dr. Tristram in *Kensit and Others* v. *The Rector of St. Ethelburga, Bishopgate Within* (9), with respect to the illegality of the Tabernacle formerly in that church.]

The holy water stoups are not architectural decorations free from liability to be used superstitiously, but are unlawful church ornaments, or, if architectural decorations, they are liable to be used superstitiously. They ought to be removed out of the church for the same reasons which guided this Court in ordering the removal of the baldacchino in *White* v.

(1) Moore's Special Report, p. 156.
(2) 1 P. D. 316, at p. 342.
(3) L. R. 6 P. C. 435.
(4) 2 P. D. 361.
(5) (1889) 24 Q. B. D. 213; [1891] A. C. 666, nomine *Allcroft* v. *The Bishop of London*.
(6) [1900] P. 80.
(7) (1870) L. R. 4 P. C. 350, at p. 414.
(8) (1868) L. R. 2 P. C. 365, at p. 383.
(9) [1900] P. 80, at p. 103.

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Bowron. (1) Causing holy water to be poured into receptacles for the use of the congregation was one of the charges made against Mr. Purchas, and, though the charge was not proved, such a practice was evidently considered as illegal both by Sir Robert Phillimore in the Arches, and the Judicial Committee of the Privy Council: *Elphinstone* v. *Purchas* (2); *Hebbert* v. *Purchas*. (3) As to the use of holy water being considered unlawful in the Church of England, see also Cranmer's Works, vol. 2, p. 176 (Parker edition).

[They also referred to Hook's Church Dictionary voce Holy Water.]

The Confessional Boxes ought to be removed out of the church. They are illegal fittings in use for habitual confession, and were placed in the church without the sanction of a faculty: *Bradford* v. *Fry* (4); and it has been clearly decided that the habitual hearing of confessions by a clergyman of the Church of England may be a criminal offence. (5)

Jelf, Q.C., *Harold Hardy*, and *Thurnam*, for the opponents. The petitioner has not a sufficient interest entitling him to maintain this suit. The Church of the Annunciation is the parish church of a new parish formed under Lord Blandford's Act, and whatever may be the case in regard to ancient parishes, the only persons who have an interest in connection with the "separate and distinct" parishes formed under that Act must be residents within the limits of the parish, the 15th section of Lord Blandford's Act affording an exhaustive definition of the term "parishioner" in parishes formed under that Act, and providing that the incumbent of the new parish shall have sole and exclusive cure of souls, and the exclusive right of performing all ecclesiastical offices within the limits of the same "for the resident inhabitants therein who shall for all ecclesiastical purposes be parishioners thereof and of no other parish." The matter being thus one of ecclesiastical rights conferred by the statute law, the case of *Batten* v.

(1) (1873) L. R. 4 A. & E. 207.
(2) (1870) L. R. 3 A. & E. 66, at p. 108.
(3) (1871) L. R. 3 P. C. 605, at p. 651.
(4) (1878) 4 P. D. 93, at p. 100.
(5) (1858) 5 Jur. (N.S.) 522.

Gedye (1), relating only to the rights of parishioners in the temporal court, has no application; and the petitioner being admittedly not a resident inhabitant of the parish, the proceedings must fall to the ground, and it would not be necessary to discuss whether the articles and things objected to in the petition ought to be removed or retained. Further, many of them were there at the time the church was consecrated, and even if the act of consecration be not, as the opponents contend, conclusive as to the legality of the articles and things then in the church, all such articles and things must be considered to have been there with the personal approbation of the Bishop; and as the patent under which the Chancellor of the Diocese of Chichester sits requires that the Bishop himself should be consulted and approve any judgment the Court may come to in order to give the decision any validity, it is not likely that on being consulted the Bishop will be any party to their being removed out of the church. That the Bishop ought to be consulted in this case is clear from the terms of the patent of the Chancellor of the diocese (2), there being therein a provision enabling the Chancellor to proceed in the suit, and decide and determine it (except thereinafter excepted) "with all the rights thereto incident, without breach of the laws and customs of this excellent kingdom, nevertheless first consulting us and our successors, and having our consent in case either party earnestly crave our judgment."

As to the articles and things which have been placed in the church since its consecration—namely, the images, some of the crucifixes, the holy water stoups, one of the Confessional Boxes, and the Tabernacle on the altar in the side chapel of the church—the opponents are prepared if necessary to apply for a confirmatory faculty for their retention. Assuming that the Court would refuse to grant a confirmatory faculty for the Stations of the Cross and the crucifixes, the opponents would desire to take the opinion of the Appellate Court as to their

(1) 41 Ch. D. 507.

(2) The patent of the then Chancellor of the Diocese of Chichester, which so far as material appears to be similar in terms to that by which the present Chancellor of the diocese was appointed, will be found set out in the case of *Ex parte Medwin and Hurst*, (1853) 1 E. & B. 609.

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retention. As to the Tabernacle in the side chapel—the only one strictly to be called a Tabernacle and used for the reception of the Sacrament—its illegality would only be provable if reservation of the Sacrament had been decided to be illegal, as to which much might be said on either side, the point being still in doubt. With respect to the images and crucifixes, no evidence has been given from which it could be inferred that they were liable to superstitious abuse as was decided in *The St. Ethelburga Case.* (1) The holy water stoups ought not to be removed. The use of them by the congregation has never been shewn to be an illegal practice; and inasmuch as the charge against Mr. Purchas of providing holy water to be used by the congregation was dismissed (*Elphinstone* v. *Purchas* (2)), that case cannot be treated as affording the Court any guidance at all with respect to the matters connected with that charge. The use of holy water by the congregation is not in connection with any service, but may be as allowable as mixing water with the wine used in the Communion Service before the service commences: *Read and Others* v. *The Bishop of Lincoln.* (3) Lastly, assuming the Confessional Boxes to have been used for habitual confession, there is no decision that the practice of habitual confession is illegal. In *Poole* v. *The Bishop of London* (4) the charge proved was the abuse of habitual confession, as to which no evidence has been or could be given in this case.

Cur. adv. vult.

1900. Feb. 1. DR. TRISTRAM. This is a faculty suit instituted by Mr. George Davey, who filed a petition in the Court, in which he is described as of "No. 1, Lincoln Cottages, in the parish of the Church of the Annunciation, in the town of Brighton," and is therein alleged to be a parishioner and ratepayer of the said parish by reason of his tenancy of that house.

The object of the suit is to obtain an order for a monition or

(1) [1900] P. 80.
(2) L. R. 3 A. & E. 66, at p. 108.
(3) [1891] P. 9, at p. 30.
(4) 5 Jur. (N.S.) 522.

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for a faculty to issue to the churchwardens of this parish, or for a faculty to issue to the petitioner or to such other person or persons as the Court may elect, to remove the following ornaments or articles of furniture from the Church of the Annunciation, on the ground that they are ornaments or articles of furniture that by ecclesiastical law cannot lawfully be introduced into or retained in a church, namely, (1.) the Stations of the Cross; (2.) an image of the Good Shepherd, with candles on each side of it and a lighted lamp in front of it; (3.) an image of the Virgin Mary, with candles on each side of it and a lighted blue light before it, and curtains and a canopy and crown over it; (4.) two holy water stoups, with holy water in them; (5.) three Confessional Boxes; (6.) several crucifixes, in different parts of the church; (7.) on the Communion Table, in the side chapel, a Tabernacle, with a light burning before it; (8.) over this Tabernacle a crucifix, with a crown over it; (9.) two images on either side of the same Communion Table, one representing the Sacred Heart and the other St. Joseph; (10.) Another Tabernacle on the Communion Table in the chancel. The petition concludes with a prayer for a monition to issue to the churchwardens of the church requiring them to remove the above ornaments or articles of furniture from the church, or to grant a faculty to the petitioner, or some other person, to effect their removal.

Upon the petition having been filed, a citation issued from the Court citing the parishioners and inhabitants of the parish to shew cause why the monition or faculty should not issue. The vicar and churchwardens appeared to the citation and filed an answer to the petition, and in paragraph 1 they allege that the petitioner is not a parishioner or resident inhabitant of the parish, and has therefore no interest cognizable by the Court in the subject-matter of his petition. The petitioner in his reply alleges that he is a parishioner and ratepayer of the parish.

The case was fully heard in the court on January 4 last, and on the two following days, and I will now deliver my judgment on the question of interest—and I shall not give any opinion on the case on its merits unless there is no appeal, or my

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decision on the question of interest shall be affirmed on appeal.

It is settled law that the promoter of a civil suit in the Ecclesiastical Courts must, if called upon by the opposite party, satisfy the Court that he has a present interest, or the possibility of an interest in the subject-matter of the suit, and that unless he so satisfies the Court his suit is dismissed.

The leading case on this point is *Fagg* v. *Lee*. (1) The circumstances leading up to it were as follows. The Archbishops and Bishops considered that it would be in the interest of the church that they should have it in their power to obtain the removal from churches of illegal ornaments by an inexpensive process in a civil form, instead of being compelled to take criminal proceedings under the Church Discipline Act, if the party to their introduction was a clergyman, or criminal proceedings by articles in their Consistorial Courts against the churchwardens—who are officers of the Ordinary. They were advised that the practice and principles of the Ecclesiastical Courts were sufficiently flexible to justify their applying to the Courts to effect this summarily by monition.

The first application for a monition was made to Sir Travers Twiss in the Consistory Court of London—who decreed it to issue. The second was made to me as his successor in the Commissary General's Court of the Diocese of Canterbury in *Lee* v. *Fagg* (1), and I, following Sir Travers Twiss' precedent, decreed a monition to issue. Against my decision there was an appeal to the Arches. Two objections were taken to it. The first a technical one, that Mr. Lee, the applicant for the monition, should have been described in the monition as secretary of the Archbishop. Secondly, that the Archbishop having no personal interest in the church could not either himself or by his secretary take proceedings in the matter in a civil suit.

The law on this point is thus stated by Sir Robert Phillimore on the appeal to the Arches. "This suit is of a civil character. In the Ecclesiastical Court there are two kinds of suits—civil and criminal. The criminal suit, which is the promotion of

(1) (1873) L. R. 4 A. & E. 135; (1874) L. R. 6 P. C. 38.

the office of the judge, that is, of the Ordinary, is open to any person whom the Ordinary may think fit to allow to promote his office, by the institution of a criminal suit; such a suit is 'ad publicam vindictam,' and in some sense concerns every member of the church. The civil suit is not open to every one, even with the consent of the Ordinary, but only to those who have a personal interest in it. It may indeed happen that a civil interest is protected or enforced by a criminal proceeding; but, nevertheless, the maintenance of this distinction between criminal and civil suits is by no means unimportant in principle. The preservation of peace in the Church generally, as well as in particular parishes, may in great measure be dependent upon the observance of it." (1)

The above ruling was approved of and affirmed on appeal by the Judicial Committee. (2)

This decision led to the introduction in Parliament of a Public Worship Bill; but one very different in form to the one that became law.

On the question of interest the petitioner's evidence was as follows: his brother was owner of No. 1, Lincoln Cottages, in this parish. He became his weekly tenant of it on September 26, 1898, at 10*s.* per week. He paid the first week's rent on October 3, 1898. He put in evidence his rent-book, with the weekly rents receipted by his brother from that date up to the present time. He procured his entry on the rate-book on September 29, 1898. There were six rooms in the house, five of which he had let for 6*s.* per week. He kept one large room on the ground floor in his own occupation. He had put some furniture in it, but never slept in it, and only went into it occasionally. He stated on cross-examination that he had taken the house for the sole purpose of giving him a locus standi to bring this suit—and that he was in partnership with his brother as a builder, and that they were joint owners of many small houses in the parish.

The rate collector for the parish of Brighton produced the rate-book by which it appeared that the rateable value of the house was 15*l.* 3*s.*, that the petitioner's name was on the rate-

(1) L. R. 4 A. & E. at p. 150. (2) L. R. 6 P. C. 38.

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book as occupier of the house, and that he had paid the rates due from September 28, 1898, up to April, 1900.

The first objection urged by Mr. Jelf to the petitioner's interest was that, inasmuch as the parish of the Annunciation, Brighton, had been created a separate parish for all ecclesiastical purposes by s. 15 of 19 & 20 Vict. c. 104, he not being a resident inhabitant in it, was not a parishioner, and was disentitled to attend and vote in the vestry of that ecclesiastical parish. The section runs thus: "The incumbent of every new parish created, or to be hereafter created, pursuant to the provisions of the said firstly and secondly stated Acts" (6 & 7 Vict. c. 37; 7 & 8 Vict. c. 94), "or this Act shall, saving the rights of the Bishop of the diocese, have sole and exclusive cure of souls and the exclusive right of performing all ecclesiastical offices within the limits of the same for the resident inhabitants therein, who shall for all ecclesiastical purposes be parishioners thereof and of no other parish, and such new parish shall, for the like purposes, have and possess all and the same rights and privileges, and be affected with such and the same liabilities as are incident or belong to a distinct and separate parish, and to no other liabilities."

To this Mr. Dibdin replied that the object of the Church Building Acts, including the one referred to, was to place new parishes in the same positions as ancient parishes, and referred to various sections in those Acts in support of this position.

The first question is, what was and still is the position of ancient parishes in relation to the qualification of vestrymen. All ratepayers, whether resident or non-resident, are (1.) members of an ancient parish vestry, provided their names are on the rate-book, and they have paid the rates as required by statute; and (2.) they are entitled to attend the vestry and vote thereat: 58 Geo. 3, c. 69, s. 2; 59 Geo. 3, c. 85, s. 1; 59 Geo. 3, c. 12, s. 22.

Thus in the case of *Wilson* v. *The Churchwardens of Sunderland* (1), in which the validity of a church rate made under a Local Act was contested, because the majority of the vestrymen who made it were not resident or sleeping in the parish,

(1) 17 C. B. (N.S.) 694; 34 L. J. (M.C.) 90.

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Erle C.J., in reference to the objection, said: "I also think it was not competent to the justices to inquire whether or not the vestry was properly constituted. If they could, I should have little hesitation in holding that 'inhabitants' in s. 5 of the Local Act do not necessarily mean persons residing and sleeping within the parish. From the time of Henry VIII. to the present time that word has in all statutes relating to rates been construed to mean 'rateable occupiers.' I know of no case where it has been held that they must reside and sleep within the parish." (1)

As regards the cure of souls the ministers of ancient parishes have always had, and still have, only the cure of souls of ratepayers who are resident in the parish, and not of non-resident ratepayers.

The 15th section of Lord Blandford's Act (19 & 20 Vict. c. 104) effects two things: (1.) It gives the minister of the new parish the exclusive cure of souls over all residents in the parish, just as the ministers in ancient parishes had over all residents within their parishes. (2.) The last part of the section, which enacts "that the new parish shall have and possess all the same rights and privileges as are incident and belong to a distinct and separate parish and to no other liabilities," made the following alterations in the law. (*a*) It relieved the ratepayers in the new parish from their liability to pay church rates for the repairs of their former parish church. (*b*) It made them liable to pay church rates for the maintenance of their new parish church. (*c*) It gave the new parish a vestry for ecclesiastical purposes, and (amongst other purposes) for the purpose of making a church rate for the maintenance of their new parish church and for providing the ornaments permitted by law to be used therein, with resident and non-resident ratepayers in the new parish as vestrymen.

Such would be the effect of the Act for the twelve years prior to the passing of the Compulsory Church Rates Abolition Act (31 & 32 Vict. c. 109). The question is, Did that Act alter the qualification of vestrymen in new parishes created after it passed? It appears to the Court it did not. On the

(1) 17 C. B. (N.S.) 694, at p. 706.

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contrary, s. 6 provides, inter alia, as follows: "This Act shall not affect vestries, or the making, assessing, receiving, or otherwise dealing with any church rate, save in so far as it relates to the recovery thereof."

The Court is therefore of opinion that this objection cannot be sustained.

The second objection urged by Mr. Jelf to the petitioner's interest was, that he had taken the house not for use, but solely for the purpose of creating a qualification as a parishioner and ratepayer, to enable him to institute this suit, and that the qualification, being a colourable one, ought not to be accepted by the Court. The petitioner admitted in evidence that such was his object in taking the house. But according to the unanimous decision of the Court of Appeal in an analogous case—*Etherington* v. *Wilson* (1)—provided the qualification is sufficient in law to make a person a parishioner, he is entitled to all the rights of a parishioner, no matter what his object was in acquiring the qualification.

In that case there was an endowment regulated by a scheme in Chancery for the maintenance of boys at Christ's Hospital, who had either themselves been born in the parish of Twickenham, or one of whose parents was or had been a parishioner of Twickenham, with a preference to candidates who were of kin to the founder. The election of candidates was to be by the minister, churchwardens, and vestrymen of the parish of Twickenham in vestry assembled. A vacancy was to be filled up by the vestry on December 31, 1874. The father of one of the candidates was Mr. Wilson, whose son was of kin to the founder, and was born in the parish of St. John's, Westminster, in which parish his father resided. Mr. Wilson, to qualify his son as a candidate for the ensuing election, took an unfurnished house on November 18, 1874, in the parish of Twickenham, for three months certain at 30*s.* per week, the tenancy if continued after that time to be terminable at one month's notice on either side. He paid a month's rent in advance, put a bed and some furniture in the house, and slept

(1) (1875) 1 Ch. D. 160.

there occasionally. His name was entered on the rate-book as a parishioner.

On December 31, 1874, his son was elected. The other candidate was Etherington, also of kin to the founder and the plaintiff in the suit, whose father had a place of business in the parish of Twickenham. Etherington filed a bill in Chancery, praying that the election should enure to him on the ground that Wilson's qualification was colourable and bad. Malins V.-C. decided in favour of Etherington on the ground that Wilson's qualification being colourable was bad. His judgment was reversed by the Court of Appeal. James L.J., in delivering judgment, said: "The Vice-Chancellor does not appear to have denied that in point of law, and for every other purpose whatever, either at common law or under any Act of Parliament, this gentleman was a parishioner of the parish of Twickenham; but admitting that he was a parishioner under an Act of Parliament, or under the common law, he came to the conclusion that he was not a parishioner within the meaning of this scheme. Now, I am not aware that there is any different interpretation of the word 'parishioner' in this scheme from what it would have in any legal documents.

"The Vice-Chancellor proceeded upon the ground that Wilson was not a bonâ fide householder and parishioner, that his qualification as a parishioner was colourable. Now, I cannot help thinking that the fallacy of the judgment arose from the use of that word 'colourable' and the use of the words 'bonâ fide.' Of course, if the man never did become the occupier—if the man never did enter into a contract for taking and never did take the house, but only got somebody to put up his name over the door, or something of that kind, then it would have been a sham. In that case he never would have been a parishioner, but if he was really a parishioner in point of law, then the thing is not colourable, is not fictitious, is not malâ fide. The meaning of the words 'bonâ fide' and 'colourable' in the Vice-Chancellor's judgment appears to me to be this—that a man under this scheme is not entitled to be considered qualified for it, if he expressly and avowedly obtains the qualification for that purpose, and for that purpose only,

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without any other intention of establishing a permanent connection with the parish. I am of opinion that no Court of Law or Equity has a right to attach any such condition or modification of the qualification. If the law enables a man to be qualified, he is qualified, and if it is intended to put any restriction upon that qualification, that restriction must be put by special enactment, or by special provision in the scheme or other document. . . . I am of opinion, therefore, that the Vice-Chancellor's declaration and decision were wrong in this case."

Mellish L.J. and Bramwell B. delivered judgments to the same effect, and Baggallay J.A. concurred.

The Court is therefore of opinion that this objection cannot be sustained, and that the petitioner has established a sufficient interest to entitle him to proceed with the suit on the charges alleged in the petition.

An appeal against this decision was asserted to the Court of Arches, but was subsequently abandoned, and on August 21 last Dr. Tristram delivered the following judgment on the merits of the case.

1900. Aug. 21. DR. TRISTRAM. This is a civil suit instituted by Mr. George Davey, as a parishioner and ratepayer of the parish of the Annunciation in Brighton, for the purpose of obtaining an order or a faculty requiring or authorizing the churchwardens of the parish, or the petitioner, or some other person or persons selected by the Court, to remove from the parish church certain ornaments placed in it without the sanction of a faculty, and which the petitioner alleges could not by ecclesiastical law be lawfully placed or retained in a church of the Church of England.

The vicar and churchwardens appeared to the citation issued in the suit as respondents, to resist the making of the order or the granting of the faculty prayed.

The case was heard before the Court on January 4 last and the two following days, when four witnesses were examined on behalf of the petitioner's case and one witness was examined for the respondents. Two questions were argued before the

Court at the hearing. Firstly, whether the petitioner, being merely an occupier of a house in the parish, and, as such, a ratepayer, but not being resident in the parish, had an interest in the ornaments of the church sufficient to entitle him to institute a suit in an ecclesiastical court in a civil form in respect of them. And secondly, whether upon the facts admitted or proved the ornaments complained of were such as could not lawfully be retained in a church of the Church of England.

On February 1 last I delivered my judgment on the question of the petitioner's interest, holding that according to the statutes and cases he had a sufficient interest to entitle him to institute the suit. Against this judgment the respondents appealed to the Court of Arches; but, having formally abandoned their appeal, I am now in a position to give my decision on the case on its merits.

The Church of the Annunciation was erected in 1864 as a mission church to St. Paul's Church, Brighton, of which the Rev. Arthur D. Wagner then was and still is vicar. It was consecrated on July 9, 1884, by the Right Rev. Bishop Tufnell, late Bishop of Brisbane, acting as commissary for the late Bishop of Chichester. Under an Order of Her Majesty in Council, dated July 31, 1880, a district had been annexed to the church, which then became a separate parish for ecclesiastical purposes. Mr. Chapman was appointed the first vicar of this parish, and continued vicar until his death in October, 1892. His successor was Mr. Fyson, who died in 1895, and he was succeeded by the present vicar. The population of the parish was stated to be 6000, composed almost wholly of the families of artisans or working-men or small tradesmen. According to the evidence of Mr. Hammond, the vicar's churchwarden, the church has accommodation for 700 persons, and the Sunday morning congregations average from 200 to 300, two-thirds of whom are parishioners, and the Sunday evening congregations average from 300 to 400, principally composed of parishioners.

Some of the ornaments complained of were in the church at the time of its consecration, namely, the fourteen Stations of the Cross, the Tabernacle over the Holy Table in the chancel,

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a large crucifix near the pulpit and three of the four Confessional Boxes in the church. The remaining ornaments complained of were introduced into the church since its consecration.

As to the ornaments objected to which were in the church at the time of consecration, Mr. Jelf submitted that the Court ought to presume that they were there with the Bishop's official sanction, and that if so they were covered by the sentence of consecration, which, being expressed to be a definitive sentence and final decree, could not now be varied by an order of this Court for their removal.

On this submission it is a matter for observation that the petition for consecration contains no reference to the manner in which the church was fitted up or to the church ornaments therein, nor does the sentence itself, which is in the usual form and merely separated and set apart the church from all profane and common uses for the celebration of Divine worship, and dedicated and consecrated it for such purpose for ever.

But the answer to Mr. Jelf's objection is, that a Bishop cannot by a sentence of consecration legalize the retention of an ornament in a church, which by law is forbidden to be there. Thus in the case of *Westerton* v. *Liddell* (1), on an application to the Consistory Court of London for an order for the removal of a cross which at the time of the consecration of St. Paul's, Knightsbridge, was affixed to the Holy Table in that church, Dr. Lushington ordered it to be disconnected and removed from the Holy Table on the ground that its being so attached to it was in contravention of the rubric requiring the table to be a flat one; and in the case of *Beal* v. *Liddell* (2), which was argued at the same time, a stone altar which was in the church of St. Barnabas, Pimlico, at the time of its consecration, was also ordered by Dr. Lushington to be removed from the church as an illegal ornament, and to be replaced by a table of wood. (3) Both these orders on appeal were affirmed by the Judicial Committee. (4)

(1) Moore's Special Report, pp. 60, 61, 82.

(2) Moore's Special Report, p. 28.

(3) Moore's Special Report, p. 82.

(4) Moore's Special Report, pp. 185, 186.

The Court will now consider seriatim the various ornaments, for the removal of which an order is asked.

There are fourteen Stations of the Cross which are admitted to have been hanging on the walls of the church since its consecration in 1884.

The question arises for what use or purpose are they there?

The answer to this question is supplied by the evidence of the petitioner and two of his witnesses, confirmed by that of the vicar's churchwarden who is one of the respondents in the case. The petitioner stated that he had witnessed the service of the Stations on more than one occasion. It commenced with a procession composed of a crucifix bearer, two acolytes carrying lighted candles, a clergyman vested in a cope and biretta, and choristers, who all proceeded to the Holy Table, where some prayers were said, and from thence they passed on to the south aisle, where having halted before the picture at the first Station, and having been there joined by the congregation, they all knelt down before the picture, and after a prayer and a short address from the clergyman, said: "Hail, Mary, the Lord is with thee. Blessed art thou among women, and blessed is the fruit of thy womb—Jesus." That the crucifix bearer, the acolytes and congregation then made this response: "Holy Mary, Mother of God, pray for us sinners now, and at the hour of our death. Amen." That the procession then proceeded in turn to each of the other Stations, kneeling before each picture and saying the service provided for it. The petitioner's evidence was corroborated by two other witnesses, and one of them stated that the priest before the picture of St. Veronica explained the legend relating to her, and before the picture of Simon of Cyrene he said, "that the virtue of the Cross changed Simon's heart."

Mr. Hammond, the vicar's churchwarden since 1888, on cross-examination, said: "I have frequently attended services of the Stations of the Cross. When we get to the first picture we all kneel down, and the priest having offered up a prayer and said the Lord's Prayer, we then say, 'Holy Mary, Mother of God, pray for us sinners now, and in the hour of death.' After the prayers at each Station the priest gives an

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account of each picture. I have heard him give the story of St. Veronica. At the end of the prayers at each Station there is an act of contrition—a short pause—when the priest says, 'Look at the picture, and thinking in your hearts, be sorry for what you have done wrong.' At the end of the prayers at each Station there is an act of contrition, and a prayer offered up to the Virgin Mary."

The printed notice of the parochial services during Holy week, 1899, included four services of the Stations of the Cross on four different days.

From the above evidence it is patent that the purpose for which the Stations of the Cross are in this church is to enable a service to be celebrated there, which is prescribed by and in use in the Church of Rome, but which is in contravention of the doctrines and practice of the Church of England.

It is, therefore, imperative on the Court, following the decisions of the Arches Court and of the Judicial Committee in the *Ridsdale Case* (1), to make an order for their removal.

The next question for the consideration of the Court relates to three Confessional Boxes which were in the church at the time of its consecration, and a piece of furniture with curtains applicable for receiving confessions introduced into the church since its consecration without a faculty.

Confessional Boxes in some form or other were a usual and appropriate piece of church furniture in English churches prior to the Reformation, as they still are in Roman Catholic churches, for convenience and to forward and encourage the practice of priests receiving habitual confessions from members of their congregation. It is for the like use that they were introduced into this church and are now sought to be retained in it. The fact that no such pieces of church furniture were allowed to remain in English churches at the time of the Reformation, and that they have never been reintroduced into our churches since the Reformation by lawful authority, is cogent evidence that the practice of habitual confession in a church forms no part of the prescribed doctrine of the Church of England.

(1) 1 P. D. 316; 2 P. D. 276.

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There are only two cases in which there has been a legal decision on this question to which I will now refer.

In the case of *Poole* v. *The Bishop of London* (1) Dr. Tait, then Bishop of London, revoked the licence of the Rev. H. Poole, curate of St. Barnabas, Pimlico, under 1 & 2 Vict. c. 106, for his practices in reference to auricular confession on the following grounds as stated in a letter from his Lordship to Mr. Poole: "I feel especially that this questioning of females on the subject of violating the Seventh Commandment is of dangerous tendency, and I am convinced generally that the sort of systematic admission of your people to confession and absolution which you have allowed to be your practice ought not to take place. Under the circumstances I feel I ought to mark my sense of the impropriety of what you describe as your practice, and I shall therefore feel myself bound, though with great pain, to withdraw your licence. . . . I earnestly pray that the solemn protest on my part against a course in which I believe you have departed from the spirit and practice of the Church of England, and assimilating your mode of dealing with your people too much to the system of the Church of Rome, may cause you to pause on the dangers to which such a cause of action as you have adopted may expose both yourself and those over whom you exercise influence. . . ." (2)

Against the Bishop's decision Mr. Poole appealed to the Archbishop of Canterbury, who heard the appeal in court with Dr. Lushington, the Dean of the Arches, sitting as his Grace's assessor.

Dr. Lushington, on summing up the case for his Grace's decision, said: "On the other hand it is maintained in support of the revocation that the course pursued by Mr. Poole is not necessary, but most dangerous, and likely to produce the most serious mischief to the cause of morality and religion; that if Mr. Poole be right, the whole body of the priests of the Church of England, down to the youngest, would have a right to follow his example; and that such proceeding is not required or

(1) 5 Jur. (N.S.) 522.

(2) See Ecclesiastical Judgments by Brodrick and Freemantle, p. 177; 5 Jur. (N.S.) 522.

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justified by the laws of the Church, but is contrary to its spirit and practice." Archbishop Sumner, in delivering his judgment, said: "With the able assistance of my learned assessor, I have given the merits and circumstances of this appeal my most serious and careful consideration. I am of opinion that the proved and admitted allegations afford, in the language of the statute, good and reasonable cause for the revocation of this licence, and that the Bishop of London has exercised a sound discretion in revoking the same; and I am further of opinion that the course pursued by the appellant is not in accordance with the rubric or doctrine of the Church of England, but most dangerous and likely to produce most serious mischief to the cause of morality and religion." (1)

The only other case in which this question has been raised was in that of *Bradford* v. *Fry* (2), in which an application was made to Dr. Robertson, as Chancellor of the Diocese of Rochester, by Mr. Fry, one of the churchwardens of St. James, Hatcham, to order by faculty the removal of a Confessional Box which had been introduced into the church by the Rev. Mr. Tooth, when vicar of the parish, without a faculty, on the ground of its being an unlawful piece of church furniture. The respondents in the suit contended that it was a legal piece of church furniture, and prayed for its retention being sanctioned by a confirmatory faculty. Dr. Robertson refused to grant a confirmatory faculty for such purpose. There was an appeal to the Arches against the Chancellor's decision on other points, but not as to the Confessional Box: *Bradford* v. *Fry*. (2)

It is my duty to order the three Confessional Boxes and the other article of church furniture appropriate for receiving confessions to be removed from the church in accordance with the judgment of Archbishop Sumner, on the ground that they are not articles of church furniture, requisite for or conducive to conformity with the doctrine or practice of the Church of England in relation to the reception of confession.

The next question for consideration relates to two water stoups introduced into the church during the last two years for holding holy water, and which, according to Mr. Hammond's

(1) 5 Jur. (N.S.) 522. (2) 4 P. D. 93.

evidence, are used by one in ten of the congregation on entering and going out of the church in the same manner as is usual in Roman Catholic churches. An order will be made for the removal of these water stoups as illegal erections in a church. The next question for consideration relates to several crucifixes in the church. For the reasons stated in my judgments in the Consistory Court of London in the case of *St. Marks, Marylebone* (1), and also in the case of *Kensit* v. *The Rector and Churchwardens of St. Ethelburga* (2), the order of the Court will be for the removal of all the crucifixes from the church.

The next question relates to the Tabernacle, said to be for the reception of the Reserved Sacrament on the Holy Table in the chancel, before which there is a light kept continually burning—and another Tabernacle on the Holy Table in the side chapel, before which also a light is always kept burning, and which, according to the evidence, is continually used for the reservation of the Sacrament. There will be an order for the removal of both of these Tabernacles.

The other ornaments complained of are an image of the Good Shepherd, placed on a pedestal at the west end of the south aisle of the church, with candles on each side of it, and a lighted lamp in front of it. An image of the Virgin Mary placed upon a pedestal standing against the screen separating the chancel from the nave, with candles on each side of it, vases of flowers and a lighted blue lamp before it and a curtain with a canopy, crown, and star over it. Images on either side of the Holy Table in the side chapel representing the Sacred Heart and St. Joseph, also the two holy water stoups in the said church. An order will be made for the removal of all these images and the two holy water stoups, as having been introduced into the church without a faculty, and as inappropriate ornaments for an English church, and in particular, seeing that there were lights burning before the images, as liable to give offence to the members of the Protestant Church of England.

The respondents, in the fifth paragraph of their answer,

(1) [1898] P. 114. (2) [1900] P. 80.

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pray that before any decision or final determination of this cause the Lord Bishop of Chichester should be first consulted, and his consent had, and they earnestly crave his judgment in the premises, and supplicate that the Bishop should examine and determine the said cause in his own proper person in this Court.

The petitioner in his reply objects to the Bishop being either consulted by me as to any decision, or to his sitting to try the cause.

Bishop Durnford after conferring on me by letters patent during my life jurisdiction as his Chancellor or Vicar-General in spirituals and Official Principal of his Episcopal and Consistory Court of Chichester, gave me authority "to proceed in *his absence from his Consistory Court of Chichester* in all and singular suits and complaints, spiritual and ecclesiastical, the decision whereof is known by law or custom of the realm to belong to our Ecclesiastical Courts, and finally to decide and determine them without breach of the laws and statutes of this excellent kingdom, *nevertheless, first consulting us and our successors and having our consent in case either party earnestly crave our judgment.*" Later on in the letters patent, certain reservations are made in favour of the Bishop in the case of criminal proceedings against clerks.

The present suit is a civil one, instituted for the purpose of compelling the churchwardens of this church to remove from the church, as being unlawful church ornaments, certain church ornaments the legal property of which is vested in them in trust for the parishioners.

The question thus raised is whether the reservation in favour of a reference to the Bishop would at the present day be held to be valid at common law, and that question is in my opinion one for the determination not of this Court, but of the Queen's Bench Division of the High Court on an application for a mandamus. As, however, the consideration of the origin of the jurisdiction of the Ecclesiastical Courts as well as of the prevailing practice in framing the letters patent of Chancellors has a material bearing on the point, I will in passing refer to them.

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The establishment of the jurisdiction of the Ecclesiastical Courts dates from the Charter of William I., by which a severance of the civil and ecclesiastical jurisdiction was established, and the determination of such matters as were deemed to be of ecclesiastical cognizance was vested in the Archbishops and Bishops, and the determination of such matters as were of civil cognizance was vested in the judges of the King's Courts.

Shortly after this severance had been effected, the Archbishops and Bishops for convenience vested by letters patent their jurisdiction in such matters in their Chancellors, as the King vested the determination of civil and criminal matters in the judges of the King's Courts. But the Bishops of some remote dioceses reserved in their letters patent the option of presiding in their courts and determining certain suits under circumstances therein specified.

The reason for this reservation, I take it, was owing to the facts that prior to the Reformation, the Bishops of the Anglican Church were generally versed in the Canon and civil law, and were frequently nominated from among the leading advocates of the Doctors Commons Bar, who were required to be in minor orders, subject to their obtaining priest's orders within four years from their nomination, with a view to their holding legal and other high offices in the State. Thus, from the time of the Conquest up to the reign of Henry VII., with one exception, all the Lord Chancellors were members of the Episcopal Bench (see Lord Campbell's Lives of the Lord Chancellors), and the Archbishop of York, the Bishop of Durham, and the Official Principal of the Archbishop of Canterbury were the recognised official representatives of the Sovereign on diplomatic missions to foreign courts.

As regards the letters patent of the Chancellors, and of the Archbishop's Officials, the practice has been to continue to frame the post-Reformation letters patent precisely in the same terms as those of the pre-Reformation letters patent.

It is also a matter for observation that in the forms of the letters patent of Chancellors appended to the report of the Ecclesiastical Courts Commission of 1883, the reservations in favour of a reference to the Bishops are printed in italics;

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but there is nothing in the report to shew that the passages so in italics are not out of date and of dubious validity.

The reason why, in my judgment, the question of the validity of the reservations in the Chichester patent is for the determination of the High Court is that the Ecclesiastical Courts are what are termed customary and inferior courts, and not courts of record, and their jurisdiction to determine suits or other matters depends upon whether by the law of England they are by custom entitled to do so, and it is laid down in all the books and cases that it is for the Common Law Courts and not for the Ecclesiastical Courts to decide questions as to the existence of a custom, or whether the custom is good or bad at law.

The reservations in this patent are evidence of the existence in early times of the custom of a Bishop to preside and decide causes in his own court. But there are two rules of law which might be held in the High Court to invalidate the reservation.

(1.) That a custom to be good must be reasonable in itself, or rather not unreasonable: Broom's Legal Maxims, 7th ed. p. 699. And it might be well held that a custom, that after a Chancellor has heard a case in court and formed an opinion of the judgment he ought to give, the Bishop should have power to veto his judgment, not having heard the case, was an unreasonable one and bad in law.

(2.) Another rule is that a custom to exercise a right must have been continuous and exercised without appreciable interruption: see Broom, Legal Maxims, p. 703.

I have been able to trace no case of the Bishops exercising such a right in recent or in former times since the Reformation.

This question is, as I have already stated, one that should be determined on mandamus and not in this Court.

I will only add that my Lord Coke, in the 4th book of his Institutes, p. 337, in treating of Consistory Courts, says: "The Consistory Court of every Archbishop and Bishop of every dioces in ecclesiastical causes is holden before his chancellour in his cathedral church, or before his commissary in places in his dioces remote and distant from the Bishop's consistory."

I may here observe that I intimated to Mr. Dibdin during

his argument in support of the petitioner's right, as a non-resident ratepayer in the parish, to apply for an order in a civil suit against the churchwardens for the removal of these ornaments, that he might have obtained a similar order in a criminal suit, by applying for leave to the Court to promote the office of the judge against them on the ground that the ornaments were illegal or of questionable legality, and I added that in my opinion he would have been entitled, though a non-parishioner, to such leave, subject to his giving security for the churchwarden's costs, and that in case of my refusal to grant such leave an appeal lay to the Arches, and from thence to the Judicial Committee, referring to the following passage of Sir Robert Phillimore's judgment in the Arches in *Fagg* v. *Lee* (1): "In the Ecclesiastical Court there are two kinds of suits—civil and criminal. The criminal suit, which is the promotion of the office of the judge, that is, of the ordinary, is open to any person whom the ordinary may think fit to allow to promote his office, by the institution of a criminal suit; such a suit is 'ad publicam vindictam,' and in some sense concerns every member of the church."

To this Mr. Dibdin suggested that unless the churchwardens had been a party to the introduction of the ornaments an objection might be taken to their being sued criminally. But the rule is that where there is a right of suit in any party, and for some technical reason he is unable to enforce that right (though a civil one) in a civil suit, he may have recourse to a criminal suit for that purpose: see *Braithwaite* v. *Hooke* (2); *Sieveking and Evans* v. *Kingsford* (3); *The Duke of Portland* v. *Bingham* (4); *Walter* v. *Montague and Lamprell* (5); *Kensit* v. *The Rector and Churchwardens of St. Ethelburga.* (6)

In such a case as the present one, I take it, the Court before granting leave to a party to promote the office of the judge against the churchwardens, would direct notice to be given to them of the application, with an intimation that it would not

(1) L. R. 4 A. & E. 135, at p. 150.
(2) (1862) 8 Jur. (N.S.) 1186.
(3) (1866) 36 L. J. (Ecc.) 1.
(4) (1792) 1 Hagg. Cons. 157.
(5) (1836) 1 Curt. 253.
(6) [1900] P. 80.

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be acceded to on their applying for a faculty to authorize them to remove such ornaments as should be held to be illegal.

The order of the Court will be that a faculty issue to the two churchwardens authorizing them to remove from the church the several ornaments and pieces of church furniture I have held in my judgment to be illegal, and that this decree do not issue until a day in the middle of November, to be named in the order, and that in case neither of the churchwardens lodge a declaration in writing with the registrar of the court within fourteen days from the service of copies of this order upon them respectively, signifying their consent to take up such faculty as soon as it shall be issued, the faculty do issue to George Davey, the petitioner in this suit, authorizing him to remove the aforesaid ornaments from the said church and to deposit them as directed by the order.

As to the costs, as some of the ornaments ordered to be removed were in the church at the time of its consecration, and others had been placed in it prior to the present churchwardens taking office, and as it does not appear that they took an active part in the introduction of those placed in the church during their tenure of office, the only order I make as to costs is that the petitioner, as the applicant for the faculty, pay into the registry all the court fees incurred in the case, leaving each party to pay their own costs. (1)

Solicitor for petitioner: *Grantham R. Dodd.*
Solicitors for opponents: *Brooks, Jenkins & Co.*

(1) On November 19 last, on the application of counsel on behalf of the Rev. H. F. Hinde, W. H. Hammond, and W. H. F. Littlechild, a Divisional Court of the Queen's Bench Division granted a rule nisi for a prohibition against the Chancellor of the Diocese of Chichester in the above suit. Application to make the rule absolute was heard on March 21 last, and after argument the writ of prohibition was refused.

C. F. J.

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Feb. 12, 13, 14, 15.

Admiralty—Collision—Negligence—Contributory Negligence—Thames By-laws, 1898, *art.* 47.

The plaintiffs' steam vessel, proceeding down the river Thames against the tide, neglected—in breach of art. 47 of the Thames By-laws—to wait, before rounding Blackwall Point, "until any other vessels rounding the point with the tide (had) passed clear," and came into collision with the defendants' steam vessel which had come up the river, and was, at the material time, in process of turning preparatory to entering the West India Dock:—

Held, by Sir F. H. Jeune P., that the defendants' vessel was to blame for negligently failing to execute the manœuvre of turning with due regard to the passing traffic; but that the plaintiffs' vessel was also to blame, for, through the breach of art. 47, she had brought herself into a position in which she would not otherwise have been, and by hampering the manœuvre of the defendants' vessel contributed to the collision and damage.

The Margaret (*Cayzer* v. *Carron Co.*), (1884) 9 App. Cas. 873, distinguished.

ACTION of damage by collision.

The plaintiffs were the owners of the *Forsete*; the defendants were the owners of the *Ovingdean Grange*.

The case is reported on the question of the effect of contributory negligence resulting from a breach of the Thames By-laws.

The facts, so far as material, were shortly as follows:—

On August 22, 1900, about 8.30 A.M., the weather being fine and clear, the tide one-third flood of the force of about two knots, and the wind fresh from the S.W., the Norwegian steam vessel *Forsete*—of 318 tons register, with thirteen hands and a pilot, from London to Grimsby in ballast—was proceeding down the lower part of Blackwall Reach in the river Thames, keeping to the southward of mid-channel, at a speed of four to five knots, when she came into collision with the British steam vessel *Ovingdean Grange*, of 1550 tons register, with thirty-eight hands and a pilot, from Antwerp to Buenos Ayres,

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viâ London, carrying a general cargo and two passengers, with a tug in attendance made fast ahead.

The *Ovingdean Grange* had sounded four short blasts on her whistle, and was, at the material time, turning in the river towards the north, with the tug towing on her starboard bow, preparatory to entering the West India Dock. In executing the manœuvre she gave three short blasts on her whistle and checked her headway by putting her engines full speed astern, but, from want of efficient look-out, went astern too long, and, getting over (as the Court found) towards the south shore, brought herself across the course of the *Forsete*, which was unable to port and go under her stern owing to the *Forsete* being hampered by a barge with which she collided.

The *Forsete* had not complied with art. 47 of the Thames By-laws. (1)

Aspinall, K.C., and *Stubbs*, for the plaintiffs, the owners of the *Forsete*.

Laing, K.C., and *Dawson Miller*, for the defendants, the owners of the *Ovingdean Grange*.

[In addition to the case cited in the judgment, *The Monte Rosa* (2) was referred to by counsel for the plaintiffs.]

THE PRESIDENT (SIR F. H. JEUNE). [After reviewing the evidence at length, the learned judge said :—] The conclusion to which I have come is that the story of the *Forsete* has in it the substantial elements of accuracy, by which I mean that, in all probability, what happened was that the *Ovingdean Grange* in turning brought herself to the south side of mid-river, and that the collision took place to the south and not to the north of mid-channel. It is common ground that the *Ovingdean Grange* was in about mid-river when she commenced to turn.

(1) Thames By-laws, made under the authority of the Thames Conservancy Act, 1894, and confirmed by the Board of Trade, April 28, 1898.

Art. 47 : "Steam vessels navigating against the tide shall, before rounding the following points, viz. . . . Blackwall Point, wait until any other vessels rounding the point with the tide have passed clear."

(2) [1893] P. 23.

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She had, according to the evidence of the engineer, been stopped ten minutes, and after that her engines were put full speed astern. The effect of that would be, in the opinion of the Elder Brethren, with which I agree, not only to destroy any headway, except such as might be due to the effect of the tide, but to give her sternway. Then, assuming that she had been stopped without headway in about mid-channel, and given her action of reversed engines, I see no answer to the inference that, in such circumstances, she must have come to the south of mid-river. There are other indications which point in the same direction. The blow was at right angles, which is perfectly consistent with the *Ovingdean Grange* reversing her engines, gathering sternway, and bringing herself well to the south of mid-channel. [The learned judge then dealt with the collision between the *Forsete* and a barge in the river, and continued:—]

On the whole, the balance of evidence, taking the admitted facts, points to the conclusion that the *Ovingdean Grange* got across to the south side of the river. How she did so is, I think, clear. She did not go ahead soon enough, and kept her screw working astern too long, and so partly owing to that, and partly owing to the action of the barge in preventing the *Forsete* from porting and keeping close to the point, and so passing close under the stern of the *Ovingdean Grange*, this collision came about. I do not say that the *Ovingdean Grange* was turning in an improper place. The Elder Brethren advise me that it is not an unusual or improper place to turn in for the purpose of going into the West India Dock; but if vessels take upon themselves to turn at that point they must do so with all due caution.

It seems to me that there was a want of proper look-out on the *Ovingdean Grange*. I do not lay more stress upon that point than this—that it explains why the *Ovingdean Grange* conducted her turning, not in an improper place, but not with that proper care which should have been shewn, and I am, therefore, unable to absolve the *Ovingdean Grange* from blame.

The case of the *Forsete* presents more difficulty. The rule which applies in this case—rule 47 of the Thames By-laws—

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appears to me to have been broken. It is clear, according to that rule, that as she was navigated against the tide she should have waited until vessels navigating with the tide had passed clear. The evidence indicates action on her part which might be urged as some compliance with that rule, because those in charge of her say that, at a particular time, namely, on hearing three blasts from the *Ovingdean Grange*, she was stopped. I think, however, that the evidence of the engineer's log shews that the stopping was not a stopping in compliance with that rule, but merely part of the order to go full speed astern, as she afterwards did. Therefore she did not comply in a real sense with that rule, which is intended to compel vessels to wait. If that be so, can it be said she ought to be held liable for any part of this collision, or ought it to be said that although she broke the rule she did not cause the collision, and that the *Ovingdean Grange*, notwithstanding the *Forsete's* breach of the rule, by ordinary care could have avoided the collision, and is therefore solely liable? I have, with the assistance of the Elder Brethren, considered that point, to which I attribute considerable importance, and I have been referred to the case of *Cayzer* v. *Carron Co.* (1), in which the law is elaborately laid down. The real point appears to me to be stated in the judgment of Lord Watson, when he says that: "A vessel which is proved to have disregarded these precautions"—that is rule 23 (now 47)—"must accept the onus of shewing that the neglect of them did not contribute to any collision or damage which may have occurred at the time or subsequently"; and he adds: "If that conduct on the part of the *Clan Sinclair* had been such as to place the *Margaret* at this disadvantage, to throw her into difficulties and make it doubtful what course she ought to pursue, then I could hardly have excused the *Clan Sinclair* from contribution to the collision in the present case; but the fact was not so . . . . and the ground of my judgment is shortly this, that assuming that there was a breach of the rule and culpable neglect at the time, yet the consequences of that neglect could have been avoided by ordinary care on the part of the *Margaret*."

(1) *The Margaret*, 9 App. Cas. 873, at p. 886.

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The above passage expresses the law to be applied to the consideration of the facts of the present case; but those facts appear to me to be different from the case with which the House of Lords had to deal. The judges in the House of Lords thought that, though the *Clan Sinclair* broke the rule, ordinary care on the part of the *Margaret* would have avoided the collision. In the present case, by not obeying this rule, the *Forsete* brought herself into a position in which she would not otherwise have been; that is to say, she got herself into the place where the collision occurred instead of being a considerable distance above. That, however, is not enough to condemn her; but then comes the question: By being there did she hamper the course or manœuvres of the *Ovingdean Grange*? I think the *Ovingdean Grange* had a right to turn at the point she did, and the very object of rule 47 appears to me to be that the vessel coming up to the point to turn round shall have the river clear from the approach of vessels coming down. That object not having been attained in this case, it appears to me circumstances of difficulty arose, partly in connection with the *Ovingdean Grange* herself, and partly in connection with the barge, which would not have arisen if the *Forsete* had obeyed the rule. Under those circumstances it appears to me, and to the Elder Brethren, that the *Forsete* by what she did enhanced the difficulties of the situation in which the *Ovingdean Grange* was placed, and threw upon her the difficulty of taking more than ordinary care in doing what she did. Therefore, although the *Ovingdean Grange* was to blame for not exercising more care than she did, I cannot say that there was not placed upon her a greater difficulty than there should have been placed upon her by reason of the *Forsete* coming improperly into the position she did. It was not due entirely to the *Ovingdean Grange*, because no doubt the barge hampered the *Forsete*; but then the *Forsete* ought not to have been in that place, and by coming there she found herself hampered by the barge, which would have passed her had she obeyed the rule, and the *Ovingdean Grange* found herself confronted by difficulty to which she should not have been exposed had the *Forsete* not been in that place hampered by the barge.

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For that state of things the *Forsete* is responsible, having broken the rule; and, therefore, the conclusion to which I have come is that the *Forsete* and the *Ovingdean Grange* are both to blame for this collision.

Solicitors for plaintiffs, the owners of the *Forsete*: *Thomas Cooper & Co.*

Solicitors for defendants: *William A. Crump & Son.*

T. L. M.

1901

Jan. 21; *Feb.* 4.

WRAY *v.* WRAY AND D'ALMEIDA.

Divorce—Practice—Substituted Service of Citations and Petition—Respondent and Co-respondent resident in Lisbon — Portuguese Law — Letters of Request Refused—Service by Registered Letters.

Where, upon a citation and petition for dissolution of marriage, it appeared that the respondent and co-respondent were known to be residing at certain addresses in Portugal, the Court, after letters of request had been applied for and refused, dispensed with personal service and ordered substituted service to be effected by registered letters.

THESE were applications arising in reference to service of the citations and petition upon the respondent and co-respondent, who were said to be resident in Lisbon.

The petitioner was a domiciled Englishman, but described in the petition as resident at Accra, in the colony of the Gold Coast, West Africa, in the employ of a telegraph company.

The petition, which was dated October 25, 1900, and filed on the following day, alleged that the respondent and co-respondent had committed adultery on certain days at a specified address in Lisbon, and also at divers other times and places; and prayed for the dissolution of the marriage and the custody of the only child.

The co-respondent was stated to be a Portuguese subject, and both he and the respondent were said to be in Lisbon.

On January 21, 1901, the petitioner moved that personal service of the citations and petition might be dispensed with, and that substituted service on the respondent and co-respondent might be effected by registered letters addressed to them

respectively in Lisbon, where it was stated that registered letters would certainly reach them.

R. H. Pritchard, for the petitioner, cited *Trübner* v. *Trübner & Christiani* (1), which, he stated, had been followed since. He also referred to *In re Cliff, Edwards* v. *Brown* (2); but

THE COURT (Gorell Barnes J.) ordered that the motion should stand over until an application for letters of request should have been made to the President.

A summons was accordingly taken out and came before the President (Sir F. H. Jeune) in chambers, when

THE PRESIDENT refused to grant the letters of request; the affidavit of the managing clerk to the petitioner's solicitors stating that he was informed by a consulting Portuguese advocate and verily believed that "there is no such thing as a divorce according to the law of Portugal," which only admits decrees separating the persons and property of husbands and wives.

On February 4 the motion for substituted service was renewed by

R. H. Pritchard, who stated that the information received from the Portuguese lawyer was to the effect that letters of request from England to Portugal to serve such documents were unknown; and, further, that, according to the law of Portugal, a man's domicil was considered to be where he was living, unless in Government employ; and, consequently, in this case, the petitioner would be considered to be domiciled in the Gold Coast, and any proceedings for a separation would, according to Portuguese law and practice, have to be taken by him against his wife in the courts of that colony. He asked leave to serve copies of the citations and petition upon the mother of the respondent and on the sister-in-law of the co-respondent, by registered letters addressed to them respectively

(1) (1889) 15 P. D. 24. (2) [1895] 2 Ch. 21.

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in Lisbon; and, also, by registered letters addressed to the respondent and co-respondent at the addresses in Lisbon, as disclosed in the affidavits.

GORELL BARNES J. made the order as now asked.

Solicitors: *E. Flux, Leadbitter & Neighbour, for Ryott & Swan, Newcastle-on-Tyne.*

H. D. G.

C. A.

1901

Feb. 27.

[IN THE COURT OF APPEAL.]

RICKABY *v.* RICKABY AND SWIFT.

Practice—Security for Costs—Motion for New Trial—Divorce Petition—Supreme Court of Judicature Act, 1890 (53 & 54 *Vict.* c. 44), *s.* 1—*Rules of Supreme Court, Order* LVIII., *r.* 15.

The Court of Appeal will not order security to be given for the costs of a motion for a new trial of a divorce petition, it not having been the practice to require security to be given in such a case before the Supreme Court of Judicature Act, 1890.

Heckscher v. *Crosley*, [1891] 1 Q. B. 224, followed.

AT the trial of a petition for a divorce, presented by a husband, a verdict was found for the respondents, and judgment was entered accordingly. The petitioner gave notice of motion in the Court of Appeal for a new trial. The co-respondent applied for security for the costs of the motion, on the ground of the poverty of the petitioner.

Harold Simmons, for the co-respondent.

Bayford, for the petitioner. In *Heckscher* v. *Crosley* (1) this Court held that inasmuch as before the Act of 1890, when motions for new trials of actions in the Queen's Bench Division were made in the Divisional Court, security for costs was not required, the same course ought to be followed now that under that Act motions for new trials are made in the Court of Appeal. There is no reported decision since the Act of 1890 with regard to motions for a new trial of a divorce petition, but it is sub-

(1) [1891] 1 Q. B. 224.

mitted that the same principle applies. Before the Act of 1890 a motion for a new trial of a divorce petition was made in the Full Court, and no case is to be found which shews that security for costs was then required.

Harold Simmons admitted that there was no reported decision on the point.

RIGBY L.J. Neither of the learned counsel has been able to tell us that before the Act of 1890 there was any difference in the practice as to security for costs between applications for new trials of divorce petitions and applications for new trials of actions in the Queen's Bench Division. It is the undoubted rule now since the Act of 1890, as was laid down in *Heckscher* v. *Crosley* (1), that security for the costs of a motion in the Court of Appeal for a new trial of an action in the Queen's Bench Division will not be required, and I can see no reason for making any distinction in this respect between divorce petitions and actions in the Queen's Bench Division. The application will be refused.

VAUGHAN WILLIAMS and STIRLING L.JJ. concurred.

Solicitors: *Milner & Bickford, for F. B. Laidler, Darlington; Riddell & Co., for Wooler & Wooler, Darlington.*

(1) [1891] 1 Q. B. 224.

W. L. C.

1901
Feb. 18.

BATEMAN *v.* BATEMAN.

Restitution of Conjugal Rights—Service out of the Jurisdiction—Decree.

A citation and petition in a suit for restitution of conjugal rights, as well as the previous letter of demand required by the rules, may now be served out of the jurisdiction; and where a decree is granted, the decree may likewise be served out of the jurisdiction.

In any further proceedings arising out of a non-compliance with the decree, the petitioner must satisfy the Court that the respondent has been served therewith at a place from which he could reasonably have returned to his wife within the period named in the decree.

UNDEFENDED SUIT by the wife for restitution of conjugal rights.

The petitioner, Beatrice Alexandra La Trobe Bateman, was married to the respondent, Lee La Trobe Bateman, at the parish church of St. James, Westminster, on February 23, 1884, and they cohabited at various places in London, there being no issue of the marriage.

Early in 1900 the respondent informed his wife that he intended to go to British Columbia. She desired to accompany him, but he objected, saying that when he was settled down and had found employment he might send for her. Early in April the respondent went down to Grayshott, where the petitioner was staying, to say good-bye, and he told her that he purposed sailing about the 11th. She received a letter from him, dated April 9, couched in affectionate terms, and ending "Ever your loving husband, Lee." She also received a telegram, dated April 11, saying that he was sailing by the *Laurentian* on the morrow.

The petitioner returned to London about a week later, and, having heard a rumour that the respondent was still in London, she employed a private inquiry agent, from whom she received a report, dated April 25, to the effect that the respondent stayed with a lady, who passed as Mrs. Bateman, at a certain hotel in London on the night of April 18, and that they left on the following day; and that after staying at another hotel until the 21st, they went to Southampton and sailed on board

the *St. Louis* for New York, under the names of Mr. and Mrs. Bateman. A copy of this report was forwarded to the respondent by the petitioner, and acknowledged by him, with expressions of regret for the cruel wrong he had done.

On July 4, 1900, the petitioner wrote to the respondent, asking him to return to her as soon as possible and let them live together again. This request the petitioner repeated by registered letter, dated July 12, 1900, addressed to the Vancouver Club, Vancouver.

These two letters were acknowledged by the respondent under date August 24, 1900, from that place. He then told the petitioner that what she asked was impossible; that he had no wish to return to the old country and the old life; and that they were "far better separated in every sense of the word." This letter concluded: "So all I wish is that the law take its course, and that in as short a time as possible you may be freed from an impossible and impracticable position, and that you may be happy and contented in your future life. For myself, I wish to be entirely forgotten, but shall ever remain your affectionate Lee."

On October 23, 1900, the petition for restitution of conjugal rights was filed, and on November 7, 1900, upon application by counsel for the petitioner, the President (Sir F. H. Jeune) gave leave to serve the citation and petition on the respondent out of the jurisdiction, subject to the filing of an affidavit by the petitioner to the effect that her husband was domiciled in England.

Service was effected at Vancouver on November 24, 1900, and, the thirty days limited by the citation for entering an appearance having expired, the case was set down and now came on as undefended.

Barnard (*Inderwick, K.C.*, with him), for the petitioner, called their client, who proved the foregoing facts, and asked for a decree.

GORELL BARNES J. There must be a decree for restitution of conjugal rights in this case. As the respondent is abroad,

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Gorell Barnes J.

he must, should he mean to comply with the decree, have a reasonable time to make his arrangements. I think that a reasonable time in this case would be two months after he is served with the decree. As to the point of service out of the jurisdiction, I have had to consider it before (1); but in that case the petition and citation were served in London; and, although the decree for restitution was served upon the respondent while temporarily staying in Dublin, he was subsequently served at Chester with a copy of the same decree. It seems to me that in all these cases, if you serve a respondent at a place which, although outside the jurisdiction, is one from which he can reasonably get back to his wife within the time limited in the decree, it is reasonable to hold that it is good service. In any further proceedings which the petitioner may take, she will have to satisfy the Court that the respondent has been served with the decree for restitution of conjugal rights at a place from which he could reasonably have got back to her within the time limited in the decree.

Solicitors: *Cunliffes & Davenport.*

(1) *Dicks* v. *Dicks*, [1899] P. 275.

H. D. G.

In the Goods of PRISCILLA BROTHERTON.

1901
Feb. 25.

Administration—Intestacy—Renunciation by Next of Kin—Probate Act, 1857 (20 & 21 *Vict. c.* 77), *s.* 73—*Grant needed to complete Title to Leaseholds —"Special Circumstances"—Grant to more remote of Kin* (*Brother*) *refused.*

Under an intestacy, the sole property to which the deceased was entitled consisted of a one-third undivided share in certain leaseholds under the will of her grandfather, of whose estate the deceased's brother (the present applicant) was administrator de bonis non and himself entitled to another one-third undivided share. The sole next of kin renounced, and the husband of a deceased next of kin also renounced and expressly consented to the brother taking a grant, which was required in order to complete the title on sale of the leaseholds in question :—

Held, that no "special circumstances" had been shewn for invoking the aid of s. 73, and that the application by the brother for administration must be refused.

Motion for administration under s. 73 of the Probate Act, 1857.

Priscilla Brotherton, late of Nashville, Tennessee, in the United States of America, died there on June 26, 1873, a widow without parent and intestate, leaving Margaret Ann Dearden Connell (wife of Timothy Connell) and Elizabeth Dearden Howard (wife of John Howard) her natural and lawful children and only next of kin and the persons alone entitled in distribution to her personal estate.

Margaret Ann Dearden Connell did not take administration, and died on April 29, 1892, intestate, leaving her husband, Timothy Connell, surviving.

Timothy Connell and Elizabeth Dearden Howard respectively renounced their right and title to administer Priscilla Brotherton's estate, and the former expressly consented to letters of administration being granted to Charles Dearden Megson, of 60, Pollard Street, Ancoats, Manchester, grocer and provision dealer, the natural and lawful brother of Priscilla Brotherton.

The only estate to which she was entitled at the time of her

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death was an absolute interest in a one-third undivided share in certain leasehold houses under the will of her grandfather, Charles Dearden, who died in 1834, and of whose estate Charles Dearden Megson was administrator de bonis non with the will annexed, and was also himself entitled to a one-third undivided share in the said leasehold property, which he had managed for a considerable time.

Middleton, on behalf of Charles Dearden Megson, the brother of the deceased, moved for a grant to him under s. 73. The title to the property under the grandfather's will cannot be completed without a grant to Priscilla Brotherton's estate. That is a "special circumstance" for invoking the assistance of the Court under s. 73 of the Probate Act. In the case of *In the Goods of Mary Keane* (1) a grant was made to the nephew on the renunciation of his father, who was the brother and sole next of kin of the deceased.

[GORELL BARNES J. In that case there was a spes successionis.]

After the Probate Act had come into operation, Sir C. Cresswell, following that decision, in a case where the sole next of kin and the only persons entitled in distribution renounced, made a grant to a person who would have been the next of kin if the sole next of kin had been out of the way, although the person applying had no interest: *In the Goods of Johnson*. (2) In a later case, where a deed of arrangement for the distribution of the property had been entered into by all parties interested, and it was a term of the arrangement that a person, who had, under no circumstances, any interest in the estate, should apply for letters of administration, the Court (Sir James Hannen) held that "special circumstances" had been shewn for invoking the aid of s. 73, and made the grant to the stranger: *In the Goods of Hopkins*. (3) Similarly, a grant to a stranger was made in the cases of *In the Goods of Potter* (4) and *In the Goods of Trigg*. (5) The present applicant

(1) (1828) 1 Hagg. Ecc. 692.
(2) (1862) 2 Sw. & Tr. 595.
(3) (1875) L. R. 3 P. & M. 235.
(4) [1899] P. 265; W. N. (1900) 31.
(5) Ante, p. 42.

is not a total stranger, but only a person of more remote kin than the persons who have renounced. 1901

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GORELL BARNES J. No "special circumstances" have been shewn to bring the case within the operation of s. 73. The motion must therefore be refused.

Application refused.

Solicitors: *Ayrton, Biscoe & Barclay, for Cooper & Sons, Manchester.*

H. D. G.

IN THE GOODS OF WILLIAM THOMAS BEYNON, PRESUMED DECEASED. 1901 *March* 4.

IN THE GOODS OF EMILY BEYNON, PRESUMED DECEASED.

Administration—Practice—Husband and Wife—Commorientes—Form of Oath to lead Grants of Administration.

Where a husband and wife with all their children were said to have perished in a massacre, the Court, upon affidavits that they were believed to have died intestate and uninsured, granted letters of administration to the respective next of kin of the husband and wife; and, further, gave leave to vary the usual form of oath to lead the grants, by allowing the administrator and administratrix to swear that the husband and wife perished at the same time (named), and that, after due inquiries, there was no reason to believe that either survived the other.

MOTION for leave to swear the deaths, and for grants of administration to next of kin, of two intestates, husband and wife.

William Thomas Beynon and Emily Beynon, his wife, were engaged in missionary work at Tai Yuen Fu, in the Province of Shansi, in North China, under the British and Foreign Bible Society, whose chief office is in London.

On July 9, 1900, a general massacre of all foreigners was carried out by the Chinese in the district where the Beynons laboured, and it was believed that they and their children were

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among the victims; but there were no means of ascertaining which, if either, of them survived the other, or whether both perished at the same moment.

The estate of the husband consisted of 80*l.* in cash and an interest in a sum of 238*l.* 9*s.* 7*d.* on deposit at a bank in Lancashire in the joint names of himself and his wife.

The estate of the wife, in addition to her interest in the last-mentioned sum, consisted of 50*l.* on deposit in her sole name in the Hong Kong and Shanghai Banking Corporation; 531*l.* 4*s.* to her credit on current account in the last-named bank; and 1*l.* 15*s.* 4*d.* in the hands of trustees.

The husband's only next of kin was his father, John Beynon.

The next of kin of the wife were Kate Russell, a sister, and Henry Taylor, a brother; and there were also a niece and two nephews, children of a deceased sister, Mary Ann Tankard.

Both husband and wife were believed to have died intestate and uninsured.

Willock moved, on behalf of John Beynon, for a grant of administration in the estate of William Thomas Beynon, and for leave to swear that the said William Thomas Beynon was dead, and that he died on or about July 9, 1900, and that there was no reason to believe that the wife and three children survived him.

And *Willock* also moved, on behalf of the wife's sister, Kate Russell, for a grant of administration in the estate of the wife, Emily Beynon, and for leave to swear that the said Emily Beynon was dead, and that she died on or about July 9, 1900, and that there was no reason to believe that the husband and three children survived her. [He cited *In the Goods of Wainwright* (1) and *In the Goods of Ewart.* (2)]

GORELL BARNES J. gave leave to the applicants respectively to vary the usual form of oath to lead the grants, following the

(1) (1858) 1 Sw. & Tr. 257. (2) (1859) 1 Sw. & Tr. 258.

precedent in *In the Goods of Ewart* (1), by stating therein that the husband and wife died on or since July 9, 1900, and that, after due inquiries, there was no reason to believe that either survived the other.

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Solicitors: *Patersons, Snow, Bloxam & Kinder, for Powell, Son, & Eddison, Knaresborough and Harrogate; and for Thomas John Hughes, Bridgend.*

H. D. G.

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Feb. 15, 16; *March* 4, 25.

Admiralty—Ship—Mortgage—Charterparty—Wrongful Seizure—Merchant Shipping Act, 1894 (57 & 58 *Vict.* c. 60), *s.* 34—*Counter-claim for Wages Paid—Implied Request.*

The plaintiff entered into an agreement with the owners of a steam vessel to run her on specified daily excursion trips for about six weeks, dividing the profits after deducting expenses (including the wages of the master and crew), and advancing the money to liberate part of the machinery held as a lien for repairs. In respect of the advance for the liberation of the machinery, and other advances previously made, as well as in respect of any repairs executed, the plaintiff to have "a charge and lien on the boat ranking in the highest position the owners are able to fix the same having regard to the existing circumstances."

A week after the trips commenced an instalment of the purchase-money owing to the defendant, the former owner of the vessel, fell due, and, on non-payment, the defendant, under a mortgage given by way of collateral security, seized her, alleging that the agreement between the plaintiff and the owners of the vessel was not binding upon him as it postponed his rights as mortgagee and depreciated the saleable value of the vessel:—

Held, by Sir F. H. Jeune P., that the seizure was wrongful, for the charge and lien on the vessel given to the plaintiff by her owners were subordinated to the rights of the defendant as mortgagee, so that his security was not impaired, and the mode of employment was not unusual for a vessel of the description of the steamer in question, so that her saleable value was not reduced.

The cases as to the extent of a mortgagor's powers of dealing with a vessel of which—by reason of s. 34 of the Merchant Shipping Act, 1894—he is not to "be deemed to have ceased to be owner," considered.

The defendant counter-claimed for the wages of the master and crew

(1) 1 Sw. & Tr. 258.

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paid by him after taking possession, but which had accrued due prior to that date, and in respect of which the master and crew had threatened to arrest the vessel:—

Held, that, although the seizure of the vessel by the defendant was wrongful, a request by the plaintiff to the defendant to pay the wages on behalf of the plaintiff, who was legally liable, would be implied.

ACTION by charterer against mortgagee for damages for wrongfully taking possession of the steamship *Heather Bell*.

The question turned on the extent of the powers of the mortgagor of a vessel as owner in possession under s. 34 of the Merchant Shipping Act, 1894. (1)

The material facts were shortly as follows. On July 4, 1900, the defendant, Thomas William Ward, an iron merchant of Sheffield, sold the paddle steamer *Heather Bell* to the South Coast and Continental Service, Limited, for 2500*l*., of which sum 625*l*. was paid in cash, and the balance was to be paid with interest by three bills for 625*l*. each at two, four, and six months respectively, secured by a first mortgage on the vessel.

On August 29 the South Coast and Continental Service, Limited, as owners of the *Heather Bell*, agreed to charter her until October 15 to the plaintiff William Horton, who, as owner of the Abbey Hotel at Rhos in Colwyn Bay, North Wales, was desirous of having an excursion steamer running from Liverpool during the summer season and calling at his pier.

The following were the terms of the memorandum under which the vessel made daily trips:—

"1. The boat shall be delivered to W. Horton at Liverpool forthwith as she now is without any guarantee on the part of the owners as to her present condition and equipment. The vessel shall be used for passenger and merchandise traffic between Liverpool, Rhos-on-Sea, Llandudno, Menai Straits, Colwyn Bay, and Rhyl, and not otherwise without the consent in writing of the owners.

(1) 57 & 58 Vict. c. 60, s. 34: "Except as far as may be necessary for making a mortgaged ship or share available as a security for the mortgage debt, the mortgagee shall not by reason of the mortgage be deemed the owner of the ship or share, nor shall the mortgagor be deemed to have ceased to be owner thereof."

"2. It is admitted that at the present time part of the machinery of the boat is held as a lien for repairs thereto, and it has been agreed that the said W. Horton will advance such amount as may be necessary to liberate such machinery and shall add same to what is already due to him thereon.

"3. The owners also admit that W. Horton has advanced certain other sums in connection with the boat, for which sums it is agreed that the said W. Horton shall have a charge and lien on the boat ranking in the highest position the owners are able to fix the same having regard to the existing circumstances.

"4. The said W. Horton is hereby authorized to sell such of the effects on board the boat as may not be requisite or necessary for the use of the boat and the service aforesaid, but shall bring the proceeds into the accounts hereafter mentioned.

"5. The said W. Horton shall be in no way responsible for the boat or for any repairs which may from time to time be necessary or desirable, but any repairs he thinks fit to execute shall be added to his charge and lien.

"6. The owners will keep properly insured the boat against all usual risks.

"7. The charterer shall keep true and exact accounts of all receipts for passage money, for freight on merchandise, and from the sale of wine, spirits, and other refreshments on board, and of all payments for wages, coal, oil, and other stores consumable and otherwise, and expenses of the service. The before-mentioned expenses shall be paid out of the before-mentioned receipts, and such accounts of receipts and expenditures shall be made up weekly between the owners and the charterer.

"8. The profits of the venture (if any) shall belong to and be divided in equal shares and proportions between the owners and the charterer at the expiration of the charter.

"9. If any dispute shall arise as to the meaning of this charter or upon any question arising thereunder, the same shall be referred to and settled by arbitration pursuant to the provisions of the Arbitration Act or Acts now in force.

"10. In case the mortgagees of the said vessel shall exercise their rights (if any), and thereby the charter hereby granted

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shall be affected, the owners shall not be responsible to the charterer in damages or otherwise in respect thereof.

"11. If it should be found after trial that the boat is being run at a loss, the charterer shall be at liberty to discontinue or to modify the service in such way as he may think desirable."

The South Coast and Continental Service, Limited, failed to meet the first bill for an instalment of the purchase-money which fell due on September 4, and, on September 8, the defendant, as mortgagee, took possession of the vessel, thereby preventing the execution of the agreement for the remaining period of five weeks and two days, in respect of which the plaintiff claimed 300*l.*, namely, 250*l.* half the estimated profits, and 50*l.* for pier tolls. The defendant pleaded, inter alia, that the alleged agreement was not binding upon him, as not being beneficial to his security, and, alternatively, paid 2*l.* into court in satisfaction of any damage sustained. He also counterclaimed for 30*l.* 14*s.* 6*d.*, wages paid by him to the master and crew on taking possession.

Feb. 15, 16. *Carver, K.C.*, and *Leslie Scott*, for the plaintiff. The seizure of the vessel by the defendant was wrongful, for the South Coast and Continental Service, Limited, as mortgagors in possession, had, under s. 34 of the Merchant Shipping Act, 1894, a statutory right to bind the ship and the mortgagee by the charter to the plaintiff: *Cory Brothers* v. *Stewart.* (1)

[THE PRESIDENT. The head-note in that case seems too wide.]

No doubt; but the principle laid down by the Court of Appeal in that case is in accordance with previous decisions, by which it has been established that the mortgagor may exercise the ordinary powers of an owner provided he does not impair the security of the mortgagee—that is to say, subject to that qualification, the mortgagor has authority to act as owner, and to execute any contracts to enable him to obtain the full benefit of his property: *Collins* v. *Lamport.* (2)

It lies on the defendant, as mortgagee, to justify his interference with the working of the vessel under the charter.

(1) (1886) 2 Times L. R. 508. (2) (1864) 34 L. J. (Ch.) 196.

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Robson, K.C., and *Ernest M. Pollock*, for the defendant. It is a question of fact for the Court to determine whether in the circumstances of the case the mortgagor's dealings with the ship were consistent with the mortgagee's security. It is submitted that the so-called charter relied on by the plaintiff is, in effect, a partnership agreement between him and the mortgagor postponing the rights of the defendant as mortgagee, and, by imposing onerous conditions on the vessel, impairing the value of the defendant's security. Sect. 34 of the Merchant Shipping Act, 1894, was enacted in the interest of the mortgagee for "as far as may be necessary for making the mortgaged ship . . . . available as a security for the mortgage debt," he is to be deemed owner of the ship; and, as the agreement prejudices the security of the mortgagee, the declaration in the concluding portion of the section, that the mortgagor is to be deemed to be owner, ceased to have any binding effect against the mortgagee.

Under this agreement no freight will become payable over and above what the plaintiff takes to cover the sums advanced by him by way of financing the vessel, and if any profit does arise it will go into his pocket though an unsecured creditor. The clauses inserted in this agreement are not such as are to be found in an ordinary charter. They are intended to override the mortgage, and, by giving the plaintiff priority in respect of his expenditure, deprive the defendant mortgagee of the benefit of the security. A mortgagor is not entitled to do this, for if he were he might charter the vessel for several years and assign the freight behind the back of the mortgagee: *Brown* v. *Tanner*. (1)

The vessel would not be readily saleable with such a time charter as this tied to her, and, therefore, the agreement is not binding on the mortgagee: *The Celtic King*. (2)

Carver, K.C., in reply. The object of s. 34 of the Merchant Shipping Act, 1894, re-enacting in substance s. 70 of the Act of 1854, is, on the one hand, to relieve the mortgagee of any liability for current expenses, and, on the other hand, provided the security of the mortgagee is not thereby impaired, to enable the mortgagor to be treated, in his employment of the ship, as

(1) (1868) L. R. 3 Ch. 597. (2) [1894] P. 175.

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an unfettered owner: *Keith* v. *Burrows*. (1) On the true construction of this charter, the charge and lien, referred to in paragraph 3, do not take priority of the mortgage, so that the rights of the mortgagee are not postponed, and the short period of time during which the vessel was to run as an excursion steamer would not in the case of a vessel like the *Heather Bell*, built specially for this description of work, diminish her saleable value.

Cur. adv. vult.

March 4. THE PRESIDENT (SIR F. H. JEUNE). The question in this case is whether the defendant, Mr. Thomas William Ward, was justified in taking possession of the *Heather Bell* by virtue of a mortgage to him of that vessel notwithstanding a contract (I purposely use a general term) which had been entered into between her owners and the plaintiff, Mr. W. Horton, in regard to her. The mortgage to the defendant was registered on July 13, 1900, and, after reciting that the South Coast and Continental Service, Limited, had purchased the *Heather Bell* from Mr. Thomas William Ward, mortgaged the vessel to Mr. Ward to secure the instalments of the purchase-money with interest. On September 4 default was made in the payment of one of these instalments, and thereafter the defendant was unquestionably entitled to exercise his rights as mortgagee and take possession of the vessel, unless he was prevented from doing so by the operation of the contract to which I have referred. That contract was made on August 29 between the plaintiff and the South Coast and Continental Service, Limited, and was in the following terms: [The learned judge read the contract already set out, and continued:—]

It was alleged by the plaintiff that this contract was a charterparty, and by the defendant that it was an agreement. In fact it was both. It provided for the terms on which the plaintiff should use the vessel on the service between Liverpool and Rhos and other places, and it also gave the plaintiff a charge on the vessel in respect of the advances and payments made, or to be made, by him, and referred to in clauses 2 and 3.

(1) (1877) 2 App. Cas. 636.

The law with regard to the rights of the mortgagor of a ship to deal with it so long as the mortgagee abstains from taking possession is, in general, well recognised. The 70th section of the Merchant Shipping Act, 1854 (1), which enacted that a "mortgagee shall not by reason of his mortgage be deemed to be the owner of a ship or any share therein, nor shall the mortgagor be deemed to have ceased to be owner of such mortgaged ship or share, except in so far as may be necessary for making such ship or share available as a security for the mortgage debt," received an authoritative exposition by Lord Westbury in the case of *Collins* v. *Lamport* (2), decided in 1864. It was there laid down that "as long . . . . as the dealings of the mortgagor with the ship are consistent with the sufficiency of the mortgagee's security, so long as those dealings do not materially prejudice and detract from, or impair the sufficiency of the security of the vessel, as comprised in the mortgage, so long is there parliamentary authority given to the mortgagor to act in all respects as owner of the vessel, and if he has authority to act as owner, he has of necessity authority to enter into all those contracts touching the disposition of the ship which may be necessary for enabling him to get the full value and the full benefit of his property." This case, therefore, asserts in the clearest terms the right of a mortgagor to deal with his property, provided that his dealings do not materially impair the security of the mortgagee, and his right so to deal is not limited to doing so by any particular form of contract, whether that of a charterparty or any other.

The case of *Keith* v. *Burrows* (3) shews that the mortgagor is by no means bound to employ the ship in a way profitable to himself or of advantage to the mortgagee as providing earnings of which the mortgagee might take possession. Lord Cairns in that case laid it down in the broadest terms: "The mortgagee of a ship does not, ordinarily speaking, or by a mortgage such as existed in the present case, obtain any transfer by way of contract or assignment of the freight, nor does the mortgagor

(1) The corresponding section (34) of the Merchant Shipping Act, 1894, now in force, is set out above.

(2) 34 L. J. (Ch.) 196.

(3) 2 App. Cas. 636.

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of a ship undertake to employ the ship in any particular way, or indeed to employ the ship so as to earn freight at all. The mortgagor of a ship may allow the ship to lie tranquil in dock, or he may employ it in any part of the world, not in earning freight, but for the purpose of bringing home goods of his own or for his own benefit." The principle of these cases was followed in the case of *Cory Brothers* v. *Stewart*. (1) In that case it would appear that by the terms of the charterparty the whole, or nearly the whole, of the freight was payable at or before the time of the sailing of the vessel, so that the mortgagee could not by taking possession obtain any or any substantial advantage out of the operation of the charterparty. "The security," said the Master of the Rolls, "was, of course, a freight-earning ship, but a particular charterparty was not part of the security. That was not what was mortgaged. The ship must be capable of earning freight, but not necessarily within a week or a month, or any particular period. If anything had been done in the present case which had prevented the ship from being a freight-earning ship, that would no doubt have impaired the security, but what had in fact happened had not impaired the security. The mortgagee so long as he kept possession could not throw over the charterparty, but must fulfil it in all its terms."

It is not, to my mind, easy to reconcile the principles laid down in these cases with the principle which governed the case of *Brown* v. *Tanner* (2) in the Court of Appeal. There the mortgagor, after making a charterparty, under which freight was payable, during the voyage assigned the freight to a third person. It was held that the mortgagee, having taken possession before the freight became due, was entitled to it, notwithstanding its assignment by the mortgagor. Page Wood L.J., in delivering the judgment of the Court, said: "The mortgagor . . . . can . . . . bind the mortgagee by a charterparty, being to that extent in a different position from the mortgagor of real property, who cannot bind his mortgagee by a lease. This was decided by Lord Westbury in *Collins* v. *Lamport*. (3) But

(1) 2 Times L. R. 508. (2) L. R. 3 Ch. 597.
(3) 34 L. J. (Ch.) 196.

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we cannot accept the inference drawn from that case by Mr. Druce, viz., that the mortgagor, having so effected a charterparty, can also mortgage the freight before it becomes due, so as to prevent the mortgagee of the ship, on taking possession before the freight is due, from receiving it. So to hold would enable the mortgagor to deprive the mortgagee of the whole benefit of the security. The ship might be chartered for several years, and the freight immediately assigned behind the back of the mortgagee." I am not aware whether Lord Cairns (who was Lord Chancellor at the time, and who appears to have sat in the case decided before *Brown* v. *Tanner* (1)) was party to the decision in *Brown* v. *Tanner*. (1) The report is silent on the point. If he was, the decision in *Brown* v. *Tanner* (1) clearly cannot be at variance with his Lordship's decision in *Keith* v. *Burrows*. (2) But I confess it is not to me easy to understand why, if the freight under a charterparty is no part of the mortgagee's security, and if the mortgagor may make a charterparty which yields no freight, or may make a charterparty under which the freight is made payable to a third party before the voyage commences, he may not assign the freight during the continuance of the voyage. It certainly can make no practical difference to the mortgagee whether the freight is alienated by the charterparty itself or by a subsequent document, his power of obtaining it being equally in both cases destroyed. However, for the purposes of the present case, it is sufficient for me to say that whether the freight created by a charterparty can or cannot be assigned subsequently so as to defeat the prospect of the mortgagee obtaining it by taking possession, the mortgagee cannot challenge or repudiate a charterparty merely on the ground that its terms are unfavourable to the interests of the mortgagor and therefore of himself. I may add that the case of *The Celtic King* (3), decided by Gorell Barnes J., illustrates the kind of charterparty which does impair the security of the mortgagee, and may therefore be repudiated by him. In that case there was an agreement by which a shipowner, whilst a steamer was being built for

(1) L. R. 3 Ch. 597. (2) 2 App. Cas. 636.
(3) [1894] P. 175.

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him, bound himself to fit her for a particular trade; that is to say, the trade in frozen meat, and run her for five years as one of a particular line, and it was held that this agreement would have a depreciatory effect upon the security of the mortgagee. "It seems to me," said the learned judge, "that where there is a contract of this particular character it would be prejudicial to the security if the mortgagee were to be obliged to admit that he could not sell the ship to realize his security in an open market without that restrictive contract. It is not like an ordinary contract for the ordinary employment of a ship which is made from time to time as things are good and as things are bad; but it is a contract which binds the vessel for a very long period, and has various clauses in it which might make it extremely difficult for any body to purchase a ship of this kind if they were bound by its terms." While, therefore, it would seem clear on the earlier authorities that the mortgagee, as I have said, cannot repudiate a contract made by the mortgagor on the ground that it is unfavourable, that must be understood with the limitation that the contract must not be such as, by reason of the length of time during which it binds the ship, or by reason of unusual provisions in it, to injuriously affect the power of sale by the mortgagee.

To apply these principles to the present case. Can it be said that the contract in question impairs the security which the *Heather Bell* constituted for the defendant by reason of his mortgage? During the argument I had some doubt whether the security was not impaired by the provision in s. 7, which appeared by the term "before-mentioned expenses" to make the sums advanced or to be advanced by the plaintiff under clauses 2 and 3 payable out of the gross receipts of the vessel. This would have been in effect an assignment of the earnings of the ship during the period of the contract, and, notwithstanding the case of *Cory Brothers* v. *Stewart* (1), I should have thought it difficult, having regard to the decision in *Brown* v. *Tanner* (2), to hold that such a contract did not impair the security and render the sale of the vessel difficult, if not impossible, according to the view taken in *The Celtic*

(1) 2 Times L. R. 508.

(2) L. R. 3 Ch. 597.

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King (1), unless, indeed, it could be said that the comparatively short time during which the contract in the present case was to be in force—namely, till October 15, 1900—made a material distinction with the facts in the case of *The Celtic King*. (1) But, on considering the present contract, I come clearly to the conclusion that the "before-mentioned expenses" in clause 7 do not include the sums referred to in clauses 2 and 3. This difficulty being cleared away, there remains, I think, no other. It is true that clauses 2 and 3 give the plaintiff a charge and lien on the *Heather Bell* for his advances, but this charge is clearly subordinated to that of the defendant, and, therefore, in no way impairs his security. The right conferred by clause 4 to sell certain articles of equipment appears to relate to some matters of very trifling importance. The rest of the contract provides for the terms on which the boat was to be run. I do not think I have to inquire whether these terms were unduly favourable to the plaintiff. They were not likely to be so, as the plaintiff had interests in the steamer running apart from her earnings. I do not think that they were unusual terms for the employment of such a vessel as the *Heather Bell*, constructed as she was for exactly such employment as is contemplated by the contract. I doubt if they would render the vessel less saleable during the currency of the contract; certainly they would not at its termination, which was only some five weeks after the defendant took possession.

It results, therefore, that in my opinion the defendant had no right to interfere with the execution of the contract; and there must be judgment for the plaintiff, with costs, and an inquiry as to the amount of damages.

March 25. The President gave leave to mention this case again on the question of the counter-claim by the defendant mortgagee for 30*l.* 14*s.* 6*d.*, money paid by the defendant after taking possession of the *Heather Bell* in respect of wages from September 1 to 7, 1900, accrued due to the master and crew of the vessel prior to the date of taking possession.

(1) [1894] P. 175.

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Ernest M. Pollock, for the defendant. The payment of the wages is admitted, and a request by the plaintiff to the defendant to pay them for and on behalf of the plaintiff will be implied, as not only was the plaintiff, by the terms of clause 7 of the agreement, personally liable for them, but the correspondence shews that the defendant gave the plaintiff notice that he intended to pay them, and it is clear that the defendant by paying them prevented the master and crew carrying out their threat of arresting the vessel.

This is sufficient to bring the case within *Johnson* v. *Royal Mail Steam Packet Co.* (1); see also the remarks of Jeune P. in *The Ripon City*. (2)

Carver, K.C., for the plaintiff. There was no express request by the plaintiff to the defendant to pay these wages, and no request will be implied, for the paying off of the crew formed part of the proceedings under which the defendant took possession of the vessel, and those proceedings have already been decided to have been wrongful.

[The case of *The Orchis* (3) was referred to.]

THE PRESIDENT. The remaining question is as to a counterclaim for a sum of money which, put shortly, was for wages due to the master and crew of the ship before the mortgagee seized her. Now it is clear—to my mind it is covered by the case of *Johnson* v. *Royal Mail Steam Packet Co.* (1)—that if the mortgagee had rightly seized there would be no question whatever that the payment of the wages would give him a claim against the person liable to pay them; but in this case I have held that the mortgagee had no right to take possession of the ship as against the person who was properly in possession under the charterparty, namely, the charterer. Does that make any real difference? I think that it does not.

In the first place, I am by no means certain that on the facts of the case it would not be sufficient to say there was an implied request, because when I find that notice was distinctly given of the intention to pay these sums, so that it would have been

(1) (1890) L. R. 3 C. P. 38. (2) [1898] P. 78, at p. 86.
(3) (1889) 15 P. D. 38.

open for the plaintiff to say, "No, don't pay for me; I will deal with the matter myself," and he took no such step, I do not think it would be too far to go, on the facts, to say that there was an implied request. If it were necessary, I should say there was.

I do not think, however, that the matter need be put upon that ground, because it seems to me immaterial whether the mortgagee had the right to take possession or not. The ship was his property, and the seizure was practically a good seizure, but for the fact that there was a charterparty which, by the Admiralty law, the mortgagee could not disturb. What difference does that make? I do not think it makes any. The principle is decided in the case of *Johnson* v. *Royal Mail Steam Packet Co.* (1), namely, that if there is an implied request it would be enforced; but the law goes further, and says, in the words afterwards used by Lord Esher in the case of *The Orchis* (2), that "if by reason of the default of one person the property of another becomes subject to seizure by law, if the person whose property is thus seized by a right process of law in consequence of the default of another pays the debt, the law implies a promise from the one whose debt is paid to repay it to the person who paid it." Now, I do not think anything turns upon the actual phrase "is thus seized," because I take it that it is enough that in this case there was a threat of seizure by those, namely, the master and crew, who had the power to seize, and although the mortgagee's ownership is not exactly the same as that of the actual owner, still for all real interests and purposes, looking at the law in its broadest aspect, it appears to me clear that the mortgagee, in order to protect the property in which at the moment he was interested in fact—whether rightly or not does not matter—was compelled to pay certain sums, and that the reason was that it was by the default of the plaintiff they were unpaid.

It, therefore, seems to me that this case comes within the principle of the judgments in the cases of *Johnson* v. *Royal Mail Steam Packet Co.* (1) and *The Ripon City.* (3) In the

(1) L. R. 3 C. P. 38. (2) 15 P. D. 38.

(3) [1898] P. 78.

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latter case I put it upon the ground that "the personal liability of the defendants to pay the sum which the plaintiff was considered to be compelled to pay, and did pay, was wanting." In this case I think the defendant was compelled to pay and did pay, and that it was by reason of the default of the person, namely, the plaintiff, who was legally liable. In those circumstances I think the counter-claim must succeed, and with such costs as are properly attributable to it.

With regard to the costs as a whole, if my attention had been called to the 2*l.* alternatively paid into court by way of satisfaction for any damage sustained, I might have thought that that might prove to be sufficient, and the plaintiff not entitled to costs. But I did give the plaintiff the costs, because his rights were infringed, and I do not think I ought to go back from that. With regard to the reference, I think the costs must be left open. There will be no costs of this hearing.

Judgment for the plaintiff on the claim, for the defendant on the counter-claim.

Solicitors for plaintiff: *Whitley & Co., Liverpool.*

Solicitors for defendant: *H. Forshaw & Hawkins, Liverpool.*

T. L. M.

Distinguished. GUNNER *v.* GUNNER AND STIRLING. [1948] 2 All E.R. 771.

[IN THE COURT OF APPEAL.]

C. A. 1901 *March* 27.

HUBBARD (OTHERWISE ROGERS) *v.* HUBBARD.

Divorce—Variation of Settlements—Jurisdiction—Meaning of "Settlement"—Absolute Assignment by Husband to Wife—Matrimonial Causes Act, 1859 (22 & 23 *Vict. c.* 61), *s.* 5.

A husband executed a deed by which he assigned to a trustee a leasehold house and some furniture, upon trust to assign the same at once to the wife absolutely, and the trustee assigned the same accordingly. The wife afterwards obtained a decree of nullity of marriage:—

Held, reversing the decision of the President, that the assignment was not a "settlement" within s. 5 of the Matrimonial Causes Act, 1859, and that the Court had no jurisdiction to vary its provisions.

Chalmers v. *Chalmers*, (1893) 1 R. 504; 68 L. T. (N.S.) 28, approved.

APPEAL against a decision of Jeune P.

The suit was brought by a wife against her husband for a decree of nullity of marriage.

The marriage took place on October 22, 1891. The wife's petition was presented on November 14, 1899. On March 3, 1900, a decree nisi of nullity was made, and, on October 10, 1900, the decree was made absolute.

On October 3, 1892, the husband executed a deed by which, after a recital that he was entitled to the lease of a house (in which he and his wife were then living) for the residue of a term of ninety-seven years from June 24, 1875, at the yearly rent of 10*l.*, and subject to the lessee's covenants and conditions in the lease contained; and that he (the husband), being desirous of making some provision for his wife, had agreed to make such assurance of the premises comprised in the lease, and of all the household furniture and effects in or about the same as was thereinafter contained, it was witnessed that, "For effectuating such desire and in pursuance of the said agreement, and in consideration of the natural love and affection which the said" (husband) "bears towards his said wife and for divers other good causes and considerations him hereunto moving," he, as beneficial owner, thereby assigned unto a trustee,

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his executors, administrators and assigns, all and singular the premises comprised in and expressed to be demised by the lease, together with the household furniture and effects in or about the same premises, to hold the leasehold premises unto the trustee, his executors, administrators and assigns, for all the residue then unexpired of the term of ninety-seven years, subject to the payment of the yearly rent of 10*l.*, and to the performance and observance of the lessee's covenants and conditions in the lease contained and thenceforth to be performed and observed, and to hold the household furniture and effects unto the trustee, his executors, administrators and assigns, absolutely, in trust nevertheless and to the intent that the trustee, his executors, administrators or assigns, should by a deed-poll, indorsed upon and intended to bear even date with, but to be executed immediately after the assignment by the husband, assign the leasehold premises and household furniture and effects thereinbefore expressed to be hereby assigned unto the wife, her executors, administrators and assigns, for her and their own absolute benefit.

By a deed-poll of the same date, indorsed on the deed of assignment, the trustee, in execution of the trust, assigned unto the wife the leasehold house and the furniture, to hold the leasehold house for the then unexpired residue of the term, subject to the payment of the yearly rent and to the performance and observance of the lessee's covenants and conditions contained in the lease, and to hold the furniture absolutely.

On October 22, 1900, the husband presented a petition in the suit, asking that, under s. 5 of the Matrimonial Causes Act, 1859, the assignment might be set aside, as being a post-nuptial settlement made by him upon his wife, and that the property comprised in it might be reassigned to him. The registrar was of opinion that the deed was not a settlement within the meaning of s. 5, and that the Court had therefore no jurisdiction to deal with it. The President, mainly upon the authority of decisions in bankruptcy such as *In re Vansittart* (1), held that the deed was a settlement within

(1) [1893] 1 Q. B. 181.

s. 5 (1), and referred it to the registrar to inquire into the means of the husband and wife.

The wife appealed.

F. Mackarness, for the wife. The deed of assignment by the husband is not a settlement. It is an absolute gift to the wife, and she could have sold the property the next day. In Davidson's Conveyancing, 3rd ed. vol. iii. Part I., at p. 1, it is said, "Some modification of the proprietary right, whereby the settled property is held otherwise than on the ordinary footing of legal ownership, is essential to the notion of a settlement." And in Bythewood and Jarman's Conveyancing, 4th ed. vol. vi., at p. 127, "settlement" is defined (quoting from Vaizey on the Law of Settlements of Property) as "a legal act designed to regulate during a specified period the enjoyment of property, and to provide during the same period for the safe custody and prudent management of the subject-matter of that property." The learned writer adds: "Settlements thus essentially involve some modification of absolute proprietary rights over property, and they usually, though not necessarily, create successive estates or interests therein." The Court of Common Pleas in *Micklethwait* v. *Micklethwait* (2) said: "The meaning of a 'settled' estate, whether in legal or in popular language, as contradistinguished from an estate in fee simple, is understood to be one in which the powers of alienation, of devising, and of transmission according to the ordinary rules of descent, are restrained by the limitations of the settlement"; and this was adopted by the Court of Exchequer Chamber. (3) An absolute legal assignment of the beneficial interest in property does not come within either of those definitions.

[STIRLING J. If a man on his marriage made over to his

(1) Sect. 5: "The Court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the Court shall seem fit."

(2) (1858) 4 C. B. (N.S.) 790, at p. 858.

(3) (1859) 4 C. B. (N.S.) 790, at p. 870.

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wife 100,000*l.* absolutely for her separate use, would it not be said that he had made a handsome settlement upon her?]

That might, no doubt, be spoken of in popular language as a settlement, but it would not be a settlement in legal language.

In *Stone* v. *Stone* (1) the Judge Ordinary expressed an opinion that a separation deed is a post-nuptial settlement.

In *Worsley* v. *Worsley* (2) it was held that "all deeds whereby property is settled upon a woman in her character as wife, and to be paid to her whilst she continues a wife, come within the scope of s. 5."

In *Chalmers* v. *Chalmers* (3) the learned President decided that an absolute assignment of property made by a wife to her husband during the marriage was not a settlement within s. 5, and that after the dissolution of the marriage the Court had no power to vary it. It is submitted that that decision was right. In the present case the President founded his decision upon some cases under s. 47 of the Bankruptcy Act, 1883, but those cases are distinguishable, because s. 47 contains an express provision that "'settlement' shall, for the purposes of this section, include any conveyance or transfer of property."

Inderwick, K.C., and *A. R. Rudall*, for the husband.

[RIGBY L.J. Was not the learned President in error in relying upon the bankruptcy cases? Sect. 47 of the Bankruptcy Act contains the very peculiar provision that a thing which is totally different from a settlement shall be a settlement for the purposes of that section.]

If the Court takes that view of the bankruptcy cases, there is nothing to be said in support of the decision.

RIGBY L.J. In my opinion the decision of the learned President that this deed is a settlement within the meaning of s. 5 of the Matrimonial Causes Act, 1859, cannot be supported, for the plain reason that the deed is not a settlement at all. If we were inquiring whether the deed ought to be set aside under s. 47 of the Bankruptcy Act, 1883, different considerations would arise—considerations which are wholly irrelevant

(1) (1864) 3 Sw. & Tr. 372. (2) (1869) L. R. 1 P. & D. 648.
(3) 1 R. 504; 68 L. T. (N.S.) 28.

on the present occasion. I am inclined to say that the decision of the learned President himself in *Chalmers* v. *Chalmers* (1) is directly in point, and is to be preferred to his decision in the present case. I do not, however, rest my decision upon *Chalmers* v. *Chalmers* (1) as an authority; I base it upon the general ground that this deed is not a "settlement" in any sense, and cannot therefore be a settlement within s. 5.

VAUGHAN WILLIAMS L.J. and STIRLING L.J. concurred.

Appeal allowed.

Solicitors: *Boxall & Boxall; Francis A. Rudall.*

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1901 *April* 1.

Admiralty—Collision—Both Ships to blame—Consequential Damage—Tort-feasors—Division of Loss—Antinomy.

In an action of damage by collision both vessels were found to blame. The decree, in the usual form, condemned the owners of the defendants' vessel and their bail in a moiety of the plaintiffs' claim in respect of the said damage, and the owners of the plaintiffs' vessel and their bail in a moiety of the defendants' counter-claim in respect of the said damage. At the reference the registrar added to the moiety of the plaintiffs' claim, payable by the defendants, a moiety of the amount of damage recovered from the plaintiffs by the owners of a barge against which the plaintiffs' vessel was driven in consequence of the collision.

The defendants appealed on the ground that, as the plaintiffs and defendants were joint tortfeasors, no contribution could be claimed from the defendants in respect of the damage to the barge paid by the plaintiffs:—

Held, by Sir F. H. Jeune P., that the decree in Admiralty had been properly carried out by adding to the moiety of their damage claimed by the plaintiffs a moiety of the consequential damage recovered by the barge owner from the plaintiffs, and that it was not material that the damage arose out of a tort.

MOTION in objection to the registrar's report.

The question turned on the extent of the Admiralty rule,

(1) 1 R. 504; 68 L. T. (N.S.) 28.

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now prevailing in all courts, that, in cross-actions of damage by collision, if both ships shall be found to have been in fault, the damage arising therefrom shall be borne equally by the owners of the two vessels. (1)

The material facts were shortly as follows :—

On August 8, 1900, about 11.15 A.M., a collision occurred in Long Reach of the river Thames between the steam vessels *Avena* and *Frankland*, and the plaintiffs, the owners of the *Avena*, brought an action in rem for damage by collision against the owners of the *Frankland*, to which the owners of the *Frankland* appeared and counter-claimed.

On November 27 the action was tried before Gorell Barnes J., assisted by two of the Elder Brethren of the Trinity House, when both vessels were found to blame. The decree in the usual form pronounced that the damage arising from the collision ought to be borne equally by the owners of the *Frankland* and by the owners of the *Avena*, and "condemned the owners of the *Frankland* and their bail in a moiety of the plaintiffs' claim in respect of the said damage, and condemned the owners of the *Avena* and their bail in a moiety of the defendants' counter-claim in respect of the said damage, and referred such damage to the registrar assisted by merchants to report the amount thereof."

The moiety claim of the owners of the *Frankland* was settled by the parties out of court, and the moiety claim of the owners of the *Avena* came before the registrar and merchants, but the amount was agreed by the parties, except as to the damage occasioned to a sailing barge named the *Hope*, against which the *Avena* was driven by the collision with the *Frankland*, and in respect of which the owners of the *Hope* had instituted an action in the City of London Court against the *Avena*. The owners of the *Avena* admitted their liability, and the damages were assessed by the registrar of that court at 269*l*. 16*s*. 10*d*. with interest and costs. This sum was paid by

(1) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 9: "In any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the courts of common law, shall prevail."

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the owners of the *Avena*, and the amount was not disputed by the owners of the *Frankland*. It was also admitted on behalf of the defendants that the damage done to the barge was directly consequent on the collision, and, therefore, part of the damage arising out of the collision; the only point at issue being whether the amount could be brought into account in the present action, and a moiety recovered from the defendants, the owners of the *Frankland*.

On March 7, 1901, the learned registrar reported in favour of the claim and assessed the damages at 348*l*. 14*s*. 10*d*.—namely, damage, 269*l*. 16*s*. 10*d*.; costs, 72*l*. 12*s*.; interest, 6*l*. 6*s*., of which sum the registrar held that the plaintiffs were entitled to recover a moiety from the defendants, the owners of the *Frankland*, namely, 174*l*. 7*s*. 5*d*.

April 1. *Dawson Miller*, in support of the motion on behalf of the defendants, the owners of the *Frankland*. The item in respect of the damage to the barge *Hope* should be disallowed, for the Admiralty rule as to division of loss only applies to what is legally recoverable, and, the plaintiffs and defendants being joint tortfeasors, the plaintiffs cannot obtain contribution from the defendants for any part of the payment made by them in respect of the damage to the barge: *Merryweather* v. *Nixan*. (1) In *The Avon and The Thomas Joliffe* (2) both tug and tow were found to blame for damage done to a third vessel, and Butt J. held that either the tug or the tow could be sued for the whole amount, and neither could obtain contribution from the other. The principle laid down in that case was followed in *The Englishman and The Australia*. (3) Subsequently, in the same case (4), the tow sought to get an assignment under s. 5 of the Mercantile Law Amendment Act, 1856 (5) of the tug's claim against *The Englishman*, but this was refused on the ground that they were not co-debtors, but joint tortfeasors. In *The Milan* (6), in which both vessels were held to blame, the cargo owners of one of the vessels

(1) (1799) 8 T. R. 186; 16 R. R. 810.
(2) [1891] P. 7.
(3) [1894] P. 239, at p. 246.
(4) [1895] P. 212.
(5) 19 & 20 Vict. c. 97.
(6) (1861) Lush. 388.

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only obtained half damages from the other vessel as they were identified with their vessel; and in accordance with that case it would have been a good defence for the owners of the *Avena* to have raised in the City of London Court that they were only liable for a moiety of the damage, as the owners of the *Frankland* were equally liable with them.

Aspinall, *K.C.*, and *Stubbs*, for the plaintiffs, the owners of the *Avena*. The item in question was properly allowed by the learned registrar, for the right of the plaintiff to recover a moiety of the damage does not rest on a claim to contribution against a joint tortfeasor, but on a decree in Admiralty finding both the colliding vessels to blame. Under that decree, and in accordance with the rule now prevailing in all courts under the Judicature Act, 1873, s. 25, sub-s. 9, the damage is to be borne equally by the owners of the two vessels. Under such circumstances the only question would be as to the remoteness of the damage; but it is admitted that the damage by the *Avena* to the barge was consequential on the collision between the *Avena* and the *Frankland*, and the amount at which the damage was assessed by the registrar of the City of London Court is not disputed. This amount has, therefore, been properly added by the learned registrar to the damage caused by the *Frankland* to the *Avena*, and a moiety of that damage is now due by the owners of the *Frankland* to the owners of the *Avena*. The cases relied on by the plaintiffs do not apply. In *The Avon and The Thomas Joliffe* (1), both tug and tow being found to blame, the owners of the third vessel could recover the whole amount of their damage from either, and no decree for the division of the damage between the tug and tow could be obtained, because the case came within the common law rule precluding one tortfeasor from obtaining contribution from the other. Similar principles govern the decisions in *The Englishman and The Australia*. (2) The only ground on which *The Milan* (3) can be supported is the identification of the cargo owner with the wrong-doing vessel, and as *Thorogood* v. *Bryan* (4) was overruled in *The*

(1) [1891] P. 7.
(2) [1894] P. 239; [1895] P. 212.
(3) Lush. 388.
(4) (1849) 8 C. B. 115.

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Bernina (1) it may be doubted how far the decision in *The Milan* (2) would hold good if subject to review. In cases of both to blame the amounts falling under the heads of salvage, demurrage, loss of charter, and similar claims consequent on the collision, have been added in ascertaining the moiety of damage payable by the other wrong-doing vessel, and, though the present claim arises out of tort, the principle involved in *Merryweather* v. *Nixan* (3) will not be extended: see *Palmer* v. *Wick and Pulteneytown Steam Shipping Co.* (4)

[The case of *The North Britain* (5), approved by the House of Lords in *Tatham, Bromage & Co.* v. *Burr* (6), was referred to.]

Dawson Miller, in reply. The doctrine laid down in *Merryweather* v. *Nixan* (3) cannot now be questioned: see per Lord Halsbury in *Palmer* v. *Wick and Pulteneytown Steam Shipping Co.* (7); and, the present case being one of tort, the principle applies. The examples cited by counsel for the plaintiffs of salvage or the loss of a beneficial contract are not in point, as they are all connected with the actual loss to the vessel which seeks to add them as consequential damage, and do not arise out of tort, so that the principle of there being no contribution between joint tortfeasors does not arise. Neither in *The North Britain* (5) nor in *Tatham, Bromage & Co.* v. *Burr* (6) was this point taken or argued.

THE PRESIDENT (SIR F. H. JEUNE). The question raised in this case presents some difficulty, because there seem to be two principles involved which are to a certain extent in conflict. On the one hand it is contended that where two vessels come into collision, ex hypothesi by the fault of both, and one of them, in consequence of the collision, comes into contact with another vessel and does damage which has to be paid for, then that is part of the damage arising out of the collision which, by the decree of the Admiralty Court, is to be shared between the two vessels. On the other hand, it is contended that inasmuch as the collision with the third vessel is a tort, both the vessels which previously came into collision are joint tortfeasors,

(1) (1887) 12 P. D. 58, at p. 82.
(2) Lush. 388.
(3) 8 T. R. 186; 16 R. R. 810.
(4) [1894] A. C. 318.
(5) [1894] P. 77.
(6) [1898] A. C. 382.
(7) [1894] A. C. 318, at p. 333.

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so that if one is sued by the third vessel she is sued for a tort, and therefore, if her owners have to pay, they cannot recover from the owners of the other vessel, on the ground that there is no contribution between joint tortfeasors.

I confess it is not very easy to see one's way out of this antinomy. My own inclination is to rest upon the broad principle indicated by the decree of the Admiralty Court, which has decided that these two vessels are to blame, and that for the damages—practically in terms, and certainly, according to the meaning of the decree, for all damages arising out of that collision—both vessels are equally responsible; that is to say, they have to divide the damages between them. Then the only question is, What damages come within the category which have to be divided equally? The expenses of salvage, or the expenses arising from a contract which had to be broken, or many other things, might be suggested as giving rise to consequential damage, to be brought into those damages which are to be equally divided; but it is said that all these incidental damages do not arise out of tort, and that, therefore, the principle of no contribution between joint tortfeasors does not arise. That is a difficulty; but, on the whole, I am inclined to rest upon the decision of the Admiralty Court, that all "damages arising out of the collision" are to be divided equally. Are these damages? Beyond all question they are, and to my mind it would be an extension of the doctrine of no contribution between joint tortfeasors to say that you must so construe the decision of the Admiralty Court as to exclude damages arising from tort committed by one of the vessels in consequence of or as the result of the collision.

No doubt it is a rule of law that joint tortfeasors cannot be called upon to contribute, and I do not intend to depart from it, but I do not wish to extend it so as to put upon a decree of the Admiralty Court a limitation arising out of an extension of that principle. There does not appear to be any decision on the point. The case of *The Avon and The Thomas Joliffe* (1) only decides that where a person is injured he can bring an action against either of the persons who did him that injury, and can recover from one, and that one cannot recover from

(1) [1891] P. 7.

the other tortfeasor. In that respect the Admiralty Court does not differ from the principle of the common law; and both cases of *The Englishman and The Australia* (1) seem to go no further. All that the first of those cases decides is that you can recover against one of two joint tortfeasors, and that one cannot recover against the other, and all that the second decides is that you cannot take advantage of s. 5 of the Mercantile Law Amendment Act because the owners of the two vessels to blame are joint tortfeasors and not co-debtors. All that is law which I think is very obvious; but none of those cases go so far as to say that where damages are connected with what in law would be a tort, they are not damages which fall within the category of the decree of the Admiralty Court. I find no decision to that effect. I do not think the case of *The Milan* (2) really helps one way or the other. I should not like to rely strongly upon that case, even if I thought it applied, because there is no doubt that the most intelligible principle upon which *The Milan* (2) rests is the identification of the cargo owner with the ship. That principle has been so shaken in the case of *The Bernina* (3) that I should not be prepared to rely upon the decision in *The Milan* (2) as one which ought to be followed in the present day, and it does not really affect the matter, because it was only a case where cargo owners brought an action, and inasmuch as the cargo was in a wrong-doing ship its owners could only recover half its value from the other wrong-doing ship.

My view is based upon the broad principle that all the damage is to be divided, and that it is not material that, in the present case, part of the damage was due to the collision with the barge, and, therefore, arose out of a tort.

Motion dismissed with costs.

Solicitors for plaintiffs, the owners of the *Avena*: *Stokes & Stokes.*

Solicitors for defendants, the owners of the *Frankland*: *Botterell & Roche.*

(1) [1894] P. 239; [1895] P. 212. (2) Lush. 388. (3) 12 P. D. 58.

T. L. M.

1901

March 28, 29.

THE SWIFT.

Admiralty—Jurisdiction—Action in Rem—"Damage done by any Ship"—Admiralty Court Act, 1861 (24 *Vict. c.* 10), *ss.* 7, 35—*Oyster-beds—Property in Oysters—Sea Fisheries Act*, 1868 (31 *&* 32 *Vict. c.* 45), *ss.* 51, 53.

The plaintiffs, owners of oyster-beds at the mouth of a navigable river, brought an action in rem against the defendants, as owners of a vessel, for so negligently navigating her as to ground on the property of the plaintiffs, and thereby do damage to their oysters and oyster-beds:—

Held, by Sir F. H. Jeune P., that the damage was "done by a ship" within the meaning of s. 7 of the Admiralty Court Act, 1861, and therefore the action would lie. Secondly, that as the damage was not done by grounding in the ordinary course of navigation, or without notice of the existence of the oyster-beds, the defendants were liable for the negligence of those in charge of their vessel; and, thirdly, that as the plaintiffs had property in the soil, and by s. 51 of the Sea Fisheries Act, 1868, in the oysters, they were entitled to enforce their claim for damage not only in respect of the disturbance of the beds, but also in respect of the destruction of the oysters.

ACTION for negligence causing damage to oysters and oyster-beds.

The plaintiffs were the Whitstable Oyster Fishery Company; the defendants were the owners of the *Swift*.

The case is reported on the question whether proceedings in rem can be instituted under ss. 7 and 35 of the Admiralty Court Act, 1861, for damage to oysters in an oyster-bed by the negligent navigation of a ship. (1)

The facts, so far as material, were shortly as follows:—

On September 30, 1900, about 12.30 P.M., the Norwegian three-masted brigantine *Swift*, drawing 12 feet 2 inches aft, from Fredrikstad to Faversham with a cargo of boards, was making for the East Swale at the mouth of the Thames. The

(1) 24 Vict. c. 10, s. 7: "The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship."

Sect. 35: "The jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings in rem or by proceedings in personam."

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weather was fine and clear, the tide about two hours before high-water ordinary neaps, the wind was fresh from S.W., and the *Swift* was standing in on the starboard tack, towards the Whitstable shore, when she touched the ground aft, where there were only twelve feet of water. Falling off slowly from the wind, she came round under a starboard helm, and, whilst filling on the port tack, dragged over the ground. She finally got away to the northward and anchored in deep water. The vessel was boarded by men from a watch-boat, stationed about the middle of the north or sea boundary of the oyster-beds, who complained, and subsequently reported, that the master of the *Swift* had neglected to keep away when hailed by them that, at the then state of the tide, there was not sufficient water, and that by the grounding of the vessel the oyster-beds belonging to the plaintiffs had been injured and large quantities of the oysters destroyed.

The defendants did not dispute the title of the plaintiffs to the ownership of the oyster-beds (1), but contended that the *Swift* was being lawfully navigated without negligence at the mouth of a tidal river; that the ordinary user of the river as a public highway involved the right of grounding; that the master of the *Swift* as a foreigner had no knowledge, and in fact had no notice, that there was property under the water which would be injured by attempting to pass over it at that particular state of the tide; that there was no indication on the published charts of the existence of the oyster-beds, nor were the limits of the fishery properly marked out by buoys and beacons, for the main purpose of the watch-boat was to prevent the oysters being stolen, and only a few of the beacons which should have indicated the boundary of the beds were standing above water.

(1) The history of the manor of Whitstable, of which the ancient oyster fishery and beds lying below low-water mark are parcel, is set out from the time of Domesday to the incorporation of the present company by 33 Geo. 3, c. xlii. in *The Free Fishers of Whitstable* v. *Foreman*, (1867) L. R. 2 C. P. 688, at pp. 694 to 704, and summarised in (1868) L. R. 3, C. P. 578, at pp. 582 to 586, and (1869) L. R. 4 H. L. 266, at pp. 270 to 273. The company was reconstituted by the Whitstable Oyster Fishery Act, 1896 (59 & 60 Vict. c. xli.).

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The Court, however, found that the vessel was negligently navigated; that the master had general knowledge of the existence of the oyster-beds; that he was warned off by those in charge of the watch-boat, and that the boundary of the beds was sufficiently indicated by mark-boats and by such of the beacons as were in position.

It was further contended on behalf of the defendants that an action in rem in respect of the alleged damage to the oysters would not lie, for at the time of the passing of the Admiralty Court Act, 1861, there was no property in oysters as they were animalia feræ naturæ, so that this could not be such "damage done by a ship" as was contemplated by that statute, and that when the Sea Fisheries Act, 1868, gave property in oysters (s. 51) it provided a remedy (s. 53), and limited that remedy to personal proceedings against the master of the ship or other person actually committing an offence against the Act. (1)

(1) 31 & 32 Vict. c. 45, s. 51: "All oysters . . . . being in or on any private oyster-bed which is owned by any person independently of this Act, and is sufficiently marked out or sufficiently known as such, shall be the absolute property of . . . . such owner . . . . and in all courts of law and equity and elsewhere, and for all purposes, civil, criminal, or other, shall be deemed to be in the actual possession of . . . . such owner . . . . "

Sect. 53: "It shall not be lawful for any person other than the . . . . owner of any such private oyster-bed, his agents, servants and workmen, within the limits of such bed . . . . except for a lawful purpose of navigation or anchorage:—

"To disturb or injure in any manner, except as last aforesaid, any oyster . . . . bed, or oysters . . . . or the oyster . . . . fishery:

"And if any person does any act in contravention of this section he shall be liable to the following penalty, namely, to a penalty not exceeding two pounds for the first offence, and not exceeding five pounds for the second offence; and not exceeding ten pounds for the third and every subsequent offence; and every such person shall also be liable to make full compensation to the . . . . owner . . . . for all damage sustained by . . . . him by reason of his unlawful act, and in default of payment the same may be recovered from him by the . . . . owner . . . . by proceedings in any court of competent jurisdiction (but not in a summary manner), whether he has been prosecuted for or convicted of an offence against this section or not."

Sect. 54: "Provided always, that nothing in the last foregoing section shall make it unlawful for any person to do any of the things therein mentioned" . . . .

"(*b*) In the case of a private oyster-bed owned by any person independently of this Act, if it is not sufficiently marked out and known as such."

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Aspinall, K.C., and *A. E. Nelson*, for the plaintiffs.

Laing, K.C., and *H. Stokes*, for the defendants, the owners of the *Swift*.

[The arguments of counsel sufficiently appear from the judgment, and all the cases cited are mentioned therein.]

THE PRESIDENT (SIR F. H. JEUNE). This is an Admiralty action in rem against the owners of the brigantine *Swift* for damage done to oyster-beds and to oysters, the property of the Whitstable Oyster Fishery Company.

The first question is one of law, namely, whether any such action will lie? I am perfectly clear that it can. Before the Fisheries Act of 1868 I should have thought it clear that an action would lie, because, apart from the authority of the decided cases, especially the well-known case of *The Mayor of Colchester* v. *Brooke* (1), I should have thought that where a person has property in the soil of a river and has a right of fishery, if anybody came and disturbed that soil and killed some of the oysters placed there by the owner of the fishery, an action at common law would lie against him, certainly for disturbing the soil, which appears to me to be a case of trespass with its peculiar damage, and, I should have thought, also in respect of the oysters, for they had become the subject of property in the ordinary way, having been reduced into possession by an artificial mode of rearing. When we get to the Fisheries Act, the matter is perfectly clear. There the law, beyond all question, makes these things property, and therefore under the Fisheries Act we have persons owning property, whose property has, it is alleged, been damaged.

The question left for consideration is whether the Admiralty Court Act, 1861, gave jurisdiction of this particular kind, namely, to arrest the vessel and proceed afterwards in the Admiralty Court. It gave jurisdiction in rem and in personam, and the question is whether this is damage done by a ship within the meaning of the Admiralty Court Act. Against that view the case of *The Vera Cruz* (2) has been cited; but it

(1) (1845) 7 Q. B. 339.

(2) (1884) 10 App. Cas. 59.

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appears to me a wholly different case. I can well understand that in *The Vera Cruz* (1) it may have been held, as it was held, that there was no damage done by a ship within the meaning of the Admiralty Court Act. Lord Campbell's Act gave an action, for the first time, to the executors or representatives of a person whose death had been caused by negligence, in respect of that negligence—that being, for the first time, a cause of action according to law, and the question was whether afterwards, when the Admiralty Court Act passed, the Admiralty Court obtained jurisdiction over such matters. I can understand that that would not be so, because the claim was for damage done by a ship, and the House of Lords thought that the damage in that case was not the sort of damage which was contemplated by the Admiralty Court Act. Lord Watson puts the matter simply on that very narrow basis. He said: "I entertain no doubt that a right of action such as is given by Lord Campbell's Act . . . . is not a claim for damage done by a ship." When the learned judgment of Lord Selborne is read, it is seen that there is good reason for saying that although in the broad sense it was damage done by a ship, it was not damage done by a ship within the meaning of the Admiralty Court Act. "No one can say," Lord Selborne says, "that Lord Campbell's Act relates expressly to claims for damage done by ships; and this section in the Act of 1861 relates to that and to nothing else—maritime damage by ships is the subject of that legislation; general injuries resulting in loss of life by wrongful acts and so forth are the subject of the other. It is not very likely that when the legislation goes on such different lines it should be intended indirectly to affect by the one legislation, and in a peculiar manner, a particular case which may or may not arise under the other legislation." That by no means exhausts the very learned judgment which Lord Selborne delivered, but it appears to me that "damage done by a ship" was exactly what the damage in this case was; and, apart from the special property created in oysters by the Fisheries Act, it appears to me clear that the moment it is said that you may have an action, either in rem or in personam, for damage done by a ship, there is

(1) 10 App. Cas. 59.

brought in damage done not only to other ships, but to other property. No doubt the fact that damage was done to piers was mainly had in view when actions for damage done by ships to other kinds of property were introduced, and in principle there appears to be no difference between damage done to fishery grounds belonging to persons or damage done to oysters upon those grounds, belonging to persons, and damage done to piers. It is said that the Act of 1868 in giving a new right gives a new and, therefore, an only remedy. The terms of s. 53 are, I think, an answer to this argument. Therefore I think it is clear that an action lies in respect of this particular matter.

Then, what is the ground of the action? There is no doubt that this particular area, although owned by the plaintiffs, and although they have a right to lay down oysters in it, is still subject to the ordinary rights of navigation. That was the view expressed in the *Colchester Case* (1); and it is sufficiently clear that although you may have a grant of rights of fishery and ownership of the soil, still such rights are not in derogation of the general rights of navigation which exist anterior to and independently of such special and private rights. Therefore the right to own this soil in this particular condition and to keep oysters there is a right which is subject to the ordinary purposes of navigation, and there is no power to exclude ships from passing over that area in the ordinary course of navigation; and further, if it can be shewn that in the ordinary course of navigation it is necessary or proper to touch the soil, whether with the vessel herself or by anchors, in that case there would be such a right of grounding or anchoring, notwithstanding the ownership in the soil or in the oysters upon it. That was decided in the *Colchester Case* (1), for it was there proved that in the ordinary course of navigation it was necessary for vessels to ground at least once before getting up to Colchester, as the distance could not be done, as a matter of time, on a single tide. Therefore it was held that the ordinary rights of navigation, in spite of there being an oyster fishery, gave a right to ground under proper circumstances and at a

(1) *Mayor of Colchester* v. *Brooke*, 7 Q. B. 339.

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proper time. So, if it could be shewn in this case that there was a right of grounding in the ordinary and proper course of navigation that would have been another matter; but it is not suggested that the grounding was in the ordinary course of navigation. The master of the *Swift* never intended that she should ground. How far he was negligent may be another matter; but it is clear that this act cannot be justified as an exercise of the ordinary rights of navigation. Under those circumstances, was there negligence on his part? It is said that he had no knowledge and no sufficient notice, and need not necessarily have had any, that this was an oyster fishery. I agree it must be proved, not that he actually knew, but that he ought to have known; in other words, for this purpose, his touching the ground at any place would not be negligence unless it is shewn that he knew, or ought to have known, that that was an area within which oysters were or were likely to be placed. In this case was there such knowledge? A great deal has been said about the beacons and marks indicating the area, and consideration of the evidence leads me to think that the beacons, namely, those fixed standing beacons, were at the time when this accident took place undoubtedly deficient. But there were also the floating beacons, though they would not serve the same purpose, because no doubt they are put there rather to divide one class of oyster from another, and they would not convey to anybody so clearly the knowledge that this area was fenced off. Still, they were there, and I am not prepared to say that they would not be sufficient to convey information as to their purpose to a person who was on the alert.

The matter, however, does not depend upon the particular marks, though it is a criticism of that to say that whether they were sufficient or not they were not seen by the captain or the mate of the *Swift*. Apparently, as far as I can make out, no one on the *Swift* saw any beacons at all, and that, to my mind, throws a great deal of light upon the case, because it does not shew that care which a person navigating those waters ought to use; but the case does not stop there, because those in charge of the *Swift* had, on this particular occasion,

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clear and distinct warning. The people on the watch-boat *Betsy* were there for the purpose, among other things, of keeping off ships which in their judgment might be likely to injure the ground, and their evidence is that they hailed, and also waved, though I need not go into the question whether they hailed, but they certainly stated that they gave very clear indications that the vessel approaching ought not to enter that particular area. The answer is a complete denial that any such waving or hailing was seen or heard on board the ship. At any rate, those on the *Betsy* were sufficiently on the alert, because directly after the vessel came in and, as they say, had been fast on the ground for a little time, they undoubtedly boarded her and made a complaint. The evidence of the captain of the *Swift* is very unsatisfactory on that point, because he would not admit that anything of the sort occurred. If, as I have no doubt, they did board the *Swift* and make a complaint, I think I may go a step further and say that they were keenly alive to their duties. I am therefore disposed to believe, not only that they saw the vessel entering the area in which she was likely to ground, but that in those circumstances they did what they say they did, namely, make signs to her to keep out of the oyster ground. The captain of the *Swift*, although he is in the habit of going to and from Faversham, said he did not know of the presence of these beds. It appears to me to be difficult to believe that a man in seafaring employment can go to and from Faversham for twenty years—even allowing for the fact of his being a foreigner—without knowing what I should think pretty nearly everybody knows, namely, that there are valuable oyster-beds lying just off Whitstable.

I am taking the same view as was taken by Lord Hannen in respect of the conduct of the pilot in *The Octavia Stella* (1), and I confess I am quite unable to accept the view that the captain was not, as a mere matter of general knowledge, well aware of the presence of these oyster-beds. Therefore I think that, both from general knowledge and from special warning received at the time, the captain knew, or ought to have known, that in entering that particular part of the water he was going upon

(1) (1887) 6 Asp. M. L. C. 182.

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what was an oyster-bed. Then the question is, notwithstanding that, had he reason to suppose that he could go safely over without grounding—was it negligence on his part to take the ground? I think that it was. I think that he should have avoided going into that shelving area, and the Elder Brethren, whom I have consulted, are of the same opinion.

In the result I think there is negligence proved against the captain; that he knew, or ought to have known, of the presence of the oyster-beds; and that under the circumstances his grounding was an act of negligence for which his owners are responsible. There must be judgment for the plaintiffs, with a reference to assess the damage.

Solicitors for plaintiffs: *Lowless & Co.*
Solicitors for defendants: *Stokes & Stokes.*

T. L. M.

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March 4.

[IN THE CONSISTORY COURT OF ST. ALBANS.]

GIRT *v.* FILLINGHAM.

Ecclesiastical Law—Jurisdiction—The Clergy Discipline Act, 1892 (55 & 56 *Vict. c.* 32), *s.* 2—*Charge of having been "Convicted by a Temporal Court of having committed an Act constituting an Ecclesiastical Offence"—Conviction by Magistrates of Indecent Behaviour in a Church of the Church of England during Divine Service—The Ecclesiastical Courts Jurisdiction Act*, 1860 (23 & 24 *Vict. c.* 32), *s.* 2—*Brawling—Evidence—Monition.*

Indecent behaviour of a clergyman in a church of the Church of England during the celebration of divine service, though punishable by magistrates under the Ecclesiastical Courts Jurisdiction Act, 1860, is an offence against the general ecclesiastical law.

The Consistory Court of the diocese within which a clergyman holds preferment has jurisdiction under the 2nd section of the Clergy Discipline Act, 1892, to try and sentence him under that Act in case he is convicted by a temporal Court of having committed an act constituting an offence against ecclesiastical law, not being a question of doctrine or ritual, notwithstanding that the offence he is charged with is not an offence against morality.

THIS was a suit in which proceedings were taken under the first part of the 2nd section of the Clergy Discipline Act,

1892 (1), by William Girt, of the parish of Kettlebaston, in the county of Suffolk, prosecuting as a person approved of by the Bishop of St. Albans, against the Rev. Robert Charles Fillingham, vicar of the parish of Hexton, in the county of Herts and diocese of St. Albans. The complaint was lodged in the registry of the diocese of St. Albans on December 5, 1900, and set forth the particulars of the one charge made against the defendant in the following terms: "That the above-named Robert Charles Fillingham, on the 21st day of January, 1900, was guilty of indecent behaviour in the parish church of Kettlebaston, in the county of Suffolk, during the celebration of divine service therein, as appears from a certificate dated the 29th November, 1900, under the hand of J. F. T. Dipnall, chairman of the Court before which the case out of which the conviction arose was heard, being a certificate of the conviction on the 29th day of March, 1900, of the said R. C. Fillingham before justices of the peace acting in and for the petty sessional division of Cosford, in the county of Suffolk, and acting as a court of summary jurisdiction at Hadleigh, in the county of Suffolk, of having been guilty of the said indecent behaviour."

The defendant in his answer denied the charge made against him in the complaint.

1901. Feb. 19. The case was tried before the Chancellor of the Diocese of St. Albans (A. B. Kempe, Esq.). (2)

A certificate of the conviction of the defendant by the justices of the petty sessional division of Cosford, in the county of

(1) The 2nd section of the Clergy Discipline Act, 1892, provides, inter alia, as follows: "If a clergyman either is convicted by a temporal Court of having committed an act constituting an ecclesiastical offence, and the foregoing section does not apply to him" [a section relating to convictions for certain offences not material to the case] "or is alleged to have been guilty of any immoral act, immoral conduct, or immoral habit, or of any offence against the laws ecclesiastical, being an offence against morality and not being a question of doctrine or ritual, he may be prosecuted by any of the parishioners of the parish in which such clergyman holds preferment, or by the bishop of the diocese, or by any person approved by the bishop, and tried in the Consistory Court of the diocese in which he holds preferment. . . . ."

(2) The Court sat at 28, Great George Street, Westminster; the parties having consented to time and place.

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Suffolk, on January 21, 1900, being the conviction referred to in the particulars of charge in the complaint, having been duly transmitted to the registry of the Bishop of St. Albans, was produced in Court. It also appeared from a certified copy of an order under the hand of the chairman of the general quarter sessions of the county of Suffolk, holden at Bury St. Edmund's, that on July 10, 1900, a motion by the defendant by way of appeal from the above-mentioned justices was dismissed, and that the conviction of the defendant by the same was confirmed.

The following three witnesses were called and examined on behalf of the prosecutor: The secretary and registrar of the Bishop of St. Albans, who produced the act book of the diocese of St. Albans shewing the institution of the defendant as vicar of Hexton on April 20, 1891; the clerk of the petty sessional division of Cosford, who produced the register of the conviction of the defendant by the justices and the original conviction signed by the adjudicating justices, and, as clerk in the office of the clerk of the peace for Suffolk, the record as subsequently made up of the appeal proceedings before the court of quarter sessions confirming the conviction; and a clerk of the solicitor for the prosecutor, by whom the defendant was identified as the person convicted of the offence referred to in the complaint. (1)

No witnesses were examined on behalf of the defendant.

L. T. Dibdin, K.C., on behalf of the prosecutor. The unlawful act the defendant committed, and for which the magistrates convicted him, namely, "indecent behaviour during the celebration of divine service," has always constituted an offence against the general ecclesiastical law, notwithstanding that in certain cases the offence was punishable under the statute of 5 & 6 Edw. 6, c. 4: *Hutchins* v. *Denziloe* (2); *Newbery* v. *Goodwin* (3); *Taylor* v. *Morley* (4); *Wenmouth* v. *Collins* (5); *Jenkins* v. *Barrett* (6); Hale's

(1) See the Clergy Discipline Act, 1892, s. 5, and the Clergy Discipline Rules, Rule No. 33. [Statutory Rules and Orders for 1892, p. 265.]

(2) (1792) 1 Hagg. Cons. 181.

(3) (1811) 1 Phillim. 282.

(4) (1837) 1 Curt. 470, at p. 483.

(5) (1702) 2 Ld. Raym. 850.

(6) (1827) 1 Hagg. Ecc. 12, at p. 15.

Precedents of Criminal Cases, p. 175, No. DXXXI.; and the law on the point has not been altered by the passing of the Ecclesiastical Courts Jurisdiction Act, 1860, conferring on magistrates the jurisdiction under which the defendant was convicted. This being so, and the Clergy Discipline Act, 1892, s. 5, having provided that the defendant's conviction should, from the date on which his appeal to quarter sessions was dismissed, be conclusive proof that he has committed the act for which he was convicted, this Court is bound to adjudge the defendant guilty under the Act.

Birrell, K.C., and *Hume*, for the defendant. The 2nd section of the Ecclesiastical Courts Jurisdiction Act, 1860, giving the magistrates jurisdiction in cases of riotous and indecent behaviour in churches, and recently decided in *Vallancey* v. *Fletcher* (1) to apply to clergymen, has created a new statutory offence, and the defendant has been found guilty of that offence, and of that offence only, and there is nothing in the conviction to shew that the act for which he was so convicted constituted an ecclesiastical offence. It may well be that, as the defendant was only fined 20*s.*, the act committed by him, if the facts were before this Court, would not be held to amount to an offence against ecclesiastical law. The Court cannot go behind the conviction, and either assume or prove aliunde that the defendant has been guilty of acts which the Ecclesiastical Court would but for the Act of 1860 have had jurisdiction to punish as an offence against ecclesiastical law.

[They referred to *Rex* v. ———. (2)]

The charge stated in the complaint is not an offence within the jurisdiction of this Court under s. 2 of the Clergy Discipline Act, 1892, and the defendant, even if the offence of which he was convicted constituted an ecclesiastical offence, has not been guilty of an offence within the purview of that section. The section in question is every clause of it confined to ecclesiastical offences which are offences against morality; and as nothing appears on the conviction to shew that the defendant was convicted of an offence against morality, he ought to be acquitted on that ground alone. That the whole scope of the Clergy

(1) [1897] 1 Q. B. 265. (2) (1663) 1 Keble, 491.

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Discipline Act, 1892, is directed against offences against morality is clear on the authority of *A Beneficed Clerk* v. *Lee* (1); *The Bishop of Rochester* v. *Harris* (2); and the proper construction to put on the 2nd section of that Act is to read both the clauses of the section as relating to ecclesiastical offences which are not doctrinal or ritual offences, but are offences against morality.

THE CHANCELLOR. There is no dispute in this case as to the facts, and the whole matter has turned upon points of law. The 2nd section of the Clergy Discipline Act, 1892, provides, inter alia: [The Chancellor read the material portions of the section, and proceeded:—]

It is not alleged that Mr. Fillingham has committed any offence under the 2nd clause of the section—that clause relating to ecclesiastical offences being offences against morality—but the charge against him is entirely based on the 1st clause of the section. The certificate of the temporal Court, that Mr. Fillingham has been convicted of indecent behaviour in the parish church of Kettlebaston during the celebration of divine service, has been produced before me, and that certificate must be taken by me to be conclusive proof that Mr. Fillingham has been guilty of indecent behaviour in that church during divine service. I have, therefore, only to consider whether the act of which Mr. Fillingham has been found guilty constitutes an ecclesiastical offence. Now, I am quite clear, for the reasons which I will give at greater length when sentence is pronounced in this case, that behaviour of the character which a Court would find to be indecent behaviour in a church during the celebration of divine service does constitute an ecclesiastical offence. I therefore find Mr. Fillingham to have been guilty of this act of indecent behaviour in respect of which he has been convicted, and which constitutes an ecclesiastical offence, and will so report to the Bishop of St. Albans.

The depositions of the witnesses examined before the justices when the defendant was convicted were then read in court by

(1) [1897] A. C. 226. (2) [1893] P. 137.

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the counsel for the prosecution with the consent of the prosecutor and the defendant, but without prejudice to the right of the defendant to appeal against the Chancellor's judgment; and counsel for the prosecutor and the defendant having been heard with reference to the sentence to be passed on the defendant, the Court was adjourned.

Cur. adv. vult.

1901. March 4. THE CHANCELLOR. The Rev. Robert Charles Fillingham was, on March 29, 1900, convicted by the justices sitting in petty sessions at Hadleigh, in the county of Suffolk, of having been guilty of indecent behaviour in the parish church of Kettlebaston, in the county of Suffolk, during the celebration of divine service therein, and was fined. Against this conviction Mr. Fillingham appealed, but the quarter sessions confirmed the conviction.

The Legislature, recognising that where an offence has been committed by a clergyman it is necessary to take into account other consideration besides those which determine punishment by a temporal Court, has, by the Clergy Discipline Act, 1892, made provision for further proceedings being taken against a clergyman who has been convicted and punished for a temporal offence. In certain cases the consequence of such a conviction is that the offender is to be deprived of his benefice without further trial; in others, of a less heinous character, it is enacted that the conviction may be followed up by a proceeding in the Consistory Court of the diocese in which the offender is beneficed, in order that the ecclesiastical judge may, if the offence is shewn to be one against the ecclesiastical law, pass such further sentence as the necessities of the case may demand.

It is clear from an examination of the Act, and the rules made under it, that the importance is recognised of throwing no obstacle in the way of a prosecutor who desires to bring the conduct of a convicted clergyman before the Court of his bishop. For, where any clergyman has been convicted by a temporal Court—

(1.) That Court is bound to certify the fact to the ecclesiastical authorities;

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(2.) The certificate of the Temporal Court must be accepted by the Ecclesiastical Court as conclusive proof that the offence therein specified has been committed;

(3.) The right of the offender's bishop to veto the prosecution in the Ecclesiastical Court is limited to cases where the charge is either "vague" or "frivolous": see s. 2 (*a*) of the Act and Rules under the Clergy Discipline Act, 1892, rr. 4, 5 (1); and

(4.) The power of the ecclesiastical judge to require the prosecutor to give security for costs—an important one for the purpose of checking frivolous proceedings—is expressly withheld.

The necessity for facilitating these further proceedings is clearly indicated.

In the case now before this Court, as the conviction of Mr. Fillingham by the justices was not for an offence of the serious character which is regarded by Parliament as requiring the offender to be deprived of his benefice without further trial, proceedings have been taken, in accordance with the provisions of the Act, for the purpose of bringing the conduct of the defendant before this Court.

The prosecutor was churchwarden of Kettlebaston Church, where Mr. Fillingham's offence was committed, and was, as such, clearly a proper person to take proceedings, and as the Bishop of St. Albans could obviously not regard a charge against one of his clergy of having been convicted and fined for indecent behaviour in a church during divine service therein as either "vague" or "frivolous," no ground existed for disallowing the prosecution, and the case has consequently proceeded.

On the hearing of the complaint on February 19 last, the only evidence before me as to the nature of the offence with which Mr. Fillingham was charged was that of the certificate shewing that he was convicted by the justices of "indecent behaviour in the parish church of Kettlebaston, in the county of Suffolk, during the celebration of divine service therein on January 21, 1900," and had been fined 20*s.*; but that certificate, as already stated, must be taken by this Court as conclusive proof that

(1) These rules are printed in Statutory Rules and Orders for 1892, pp. 258–300.

Mr. Fillingham was guilty of indecent behaviour in Kettlebaston Church during divine service therein on that day.

Mr. Birrell, for the defendant, urged that under the provisions of s. 2 of the Clergy Discipline Act, 1892, before Mr. Fillingham could be convicted in the present proceedings the Court must be satisfied that the act the defendant had committed constituted an ecclesiastical offence, and contended that the act committed in this case was not, or might not be, such an offence. He also argued that the whole scheme of the Clergy Discipline Act, 1892, was directed against immoral acts and immoral conduct, and that, unless it was shewn that what Mr. Fillingham had done was an offence against morality, he must be acquitted. He did not, however, ask the Court to admit evidence to shew that the indecent behaviour of Mr. Fillingham during the celebration of divine service was not of such a character as to constitute it an ecclesiastical offence, but rested his defence on the contention that the prosecutor had not established that the act was of this character.

I held, however, that indecent behaviour by a clergyman in a church during divine service of such a character that it had led to his conviction therefor by a temporal Court must be taken to be an offence against the general ecclesiastical law. "The law also, not merely the statute of Edward VI., but the general ecclesiastical law," to quote the words of Sir John Nicholl in *Newbery* v. *Goodwin* (1), "protects the sanctity of public worship,—and, still more, endeavours to prevent any circumstance which may lead to the disturbance of persons engaged in solemn acts of devotion,—" and "requires decent and orderly behaviour." By the common law—I refer to the words of Sir William Scott in *Hutchins* v. *Denziloe* (2)—"there is no doubt that the Ecclesiastical Court had a right to interfere, to correct or punish any acts of disturbance of the public worship": see also *Burder* v. *Langley* (3), *Taylor* v. *Morley* (4), and *Wenmouth* v. *Collins*. (5)

(1) 1 Phillim. 282, at p. 283.
(2) 1 Hagg. Cons. 181.
(3) (1842) 1 N. of C. 542, at p. 547.
(4) 1 Curt. 470, at p. 483.
(5) 2 Ld. Raym. 850.

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I further held that the provisions of the first part of s. 2 of the Clergy Discipline Act, 1892, by which proceedings can be taken following up a conviction in a temporal Court, are quite distinct from the subsequent provisions relating to general charges of immoral acts and immoral conduct, and that where a clergyman has been convicted by a temporal Court of an act constituting an ecclesiastical offence, he must, on the conclusive proof prescribed by the statute being given, be convicted also in the Ecclesiastical Court under the Clergy Discipline Act, 1892, whether the act committed by him be an offence against morality or not, provided it is not a doctrinal or ritual offence.

I therefore pronounced Mr. Fillingham guilty of the ecclesiastical offence of having behaved indecently in Kettlebaston Church during the celebration of divine service therein.

But it is obvious that, though it was the duty of this Court to find the defendant guilty when the statutory conclusive proof was before it, it would not be possible to deal satisfactorily with the case without some further inquiry into the facts. The mere fact that Mr. Fillingham had been guilty of indecent behaviour in church during the celebration of divine service, and had in consequence been fined 20*s*. by the justices, does not afford material sufficient to enable the Court to arrive at a just conclusion as to the proper sentence.

I have accordingly felt it my duty to examine the depositions taken before the justices. Counsel on behalf both of the prosecution and the defence assented to this course, counsel for the defendant doing so without prejudice to his right of appeal against the conviction of his client. The result of my examination of those depositions is to shew that the indecent behaviour in Kettlebaston Church during divine service therein of which Mr. Fillingham was guilty was this. Having come to that church with a number of followers in accordance with what was already a preconcerted scheme, he and they seated themselves quietly in the church ; but during the prayer of consecration in the celebration of Holy Communion Mr. Fillingham rose from his seat and, referring to the way in which the celebrant was acting, said, " This is idolatry ! Protestants

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leave the house of Baal!" and proceeded to leave the church with his followers.

Now there cannot be any doubt that, though there was nothing of a riotous character in these proceedings, Mr. Fillingham, in acting as he did, was guilty of a deliberate and wholly unjustifiable breach of the law both civil and ecclesiastical, and of conduct of which he ought to be thoroughly ashamed. Any suggestion that his action was provoked by irregular practices on the part of the officiating clergyman affords, as Mr. Fillingham must have known, no excuse whatever. The law will not allow the clergyman of one parish to intrude into the parish of another and interfere with the performance by the latter of his spiritual duties, however much he may disapprove of the way in which they are performed (1); and will not permit anyone, even the churchwardens of a church, to interfere with the conduct of divine service by the officiating minister, however irregular it may be, except in cases of instant and overbearing necessity. (2) If it is contended that the incumbent of Kettlebaston is guilty of illegal practices it is open to any person to complain to the Bishop of Ely, upon whom the law has placed the serious responsibility of determining whether any and what action should be taken or allowed to put a stop to those practices. But it cannot be permitted that private individuals should deliberately break the law as a protest against what they conceive to be a breach of it by others. That a clergyman, of all people, should permit himself to indulge in such an indecent expression of opinion during the most solemn of the services of the Church, and should have done so, not in a moment of excitement, but as part of a prearranged plan, is simply lamentable. I regret that Mr. Fillingham has not thought fit on reflection to acknowledge his fault and express his sorrow. Such conduct cannot be allowed to be repeated.

Counsel for the prosecution has urged that a substantial sentence of suspension should be passed on Mr. Fillingham.

(1) See Phillimore, Ecclesiastical Law, pp. 907, 908. See also canon 53 of the Canons of 1603.

(2) See *Hutchins* v. *Denziloe*, 1 Hagg. Cons. 170, at pp. 173, 174.

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But, strongly as I feel that Mr. Fillingham's conduct calls for the censure of the Court, I do not consider that such a sentence would be an appropriate one. Mr. Fillingham has already received punishment for his offence. I should hope that any clergyman would regard the mere fact of a public conviction by a temporal Court—for such an offence as brawling in church during the celebration of the Holy Communion—as a serious punishment. Moreover, I am bound to consider the interests of Mr. Fillingham's own parish; indeed, the Clergy Discipline Act, 1892, expressly requires me to do so. (1) Mr. Fillingham's suspension would involve a disturbance of the spiritual oversight of the parish which must be unsatisfactory, unless there are reasons for supposing that his temporary absence from it would be desirable, and there is nothing before the Court to lead me to the conclusion that it would be desirable. It appears to me, on the contrary, that what is wanted is to secure Mr. Fillingham's closer attention to his proper duties, and to keep him from unlawful interference in the affairs of other parishes. I have not, therefore, notified to the bishop that a sentence of suspension should be passed.

But a sentence must be passed which will make it highly dangerous for Mr. Fillingham to offend again in the same way. This result will be fully secured by admonishing Mr. Fillingham not to repeat the conduct of which he has been found guilty. Under the provisions of s. 7 of the Clergy Discipline Act, 1892, "if a clergyman wilfully disobeys a sentence passed under this Act, or any requirement or direction contained in such sentence, he may be cited before the Consistory Court, and if, after the prescribed proceedings for enabling him to shew cause to the contrary, the Chancellor is satisfied that the clergyman has been so wilfully disobedient and ought to be punished for it, the Chancellor may pronounce judgment against him, ... and sentence him to such ecclesiastical punishment as the gravity of the case appears to require, including a sentence of deprivation. . . ."

I have accordingly notified the Lord Bishop of St. Albans that Mr. Fillingham has been guilty of offending against the

(1) See The Clergy Discipline Act, 1892, s. 6 (1) a.

laws ecclesiastical by indecent behaviour in Kettlebaston Church during the celebration of divine service therein, and have also notified to his Lordship that Mr. Fillingham should be admonished not to repeat such conduct.

I must also order that Mr. Fillingham pay the costs of the proceedings.

By the Rules under the Clergy Discipline Act, 1892, the sentence I have notified to the bishop as proper to be passed upon Mr. Fillingham is to be pronounced by myself, unless the Bishop signifies his intention himself to pronounce it. His Lordship desires to leave the case in my hands, but in so doing he wishes me to express his entire concurrence in the propriety of the sentence I am about to pass.

I have therefore to pronounce this sentence.

[The Chancellor then read, signed, and gave the following sentence: "In the Name of God, Amen. Whereas there is now depending in the Consistory Court of St. Albans a certain case under the Clergy Discipline Act, 1892, wherein William Girt is the prosecutor, and the Rev. Robert Charles Fillingham, vicar of the parish of Hexton, in the county of Herts and diocese of St. Albans, is defendant. And whereas the particulars of the charge alleged against the defendant by the complaint lodged in the said case are as follows": [The Chancellor read the particulars of charge set forth in the complaint, and continued:—]

"And whereas upon the trial of such case in the said Consistory Court before us under the provisions of the said Act on the 19th day of February last the defendant was found guilty of the said charge. And whereas we have notified to the Right Rev. the Lord Bishop of St. Albans that the said defendant has been so found guilty, and that the sentence hereby pronounced should be passed upon the defendant. And whereas the said Lord Bishop of St. Albans has signified to us that he does not desire himself to pronounce the sentence. Now, therefore, we, Alfred Bray Kempe, Master of Arts, Vicar-General and Official Principal of the Diocese of St. Albans, do hereby pronounce, decree, and declare that the said defendant the Rev. Robert Charles Fillingham, by reason of the premises and on account

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The Chancellor.

of his said offence whereof he was so found guilty as aforesaid, ought by law to be monished to refrain from such conduct for the future. And we do accordingly decree the said Rev. Robert Charles Fillingham to be monished so to refrain by this our definitive sentence or final decree which we read and promulge by these presents." (1)]

Solicitors for prosecutor: *Brooks, Jenkins & Co.*
Solicitor for defendant: *Othen.*

C. F. J.

1901

April 22.

IN THE GOODS OF THOMAS RICHARDSON PATON.

Administration—Probate Act, 1857 (20 & 21 *Vict. c.* 77), *s.* 81—*Sureties dispensed with.*

In a case of an estate where all the debts had been paid, and the persons applying for administration were entitled, as the duly constituted legal personal representatives in two other estates, to receive the whole of the residue, the Court dispensed with sureties and directed that the bond of the applicants alone should be accepted.

THIS was a motion for an order that, on applying for a grant of letters of administration, the bond of the applicants alone should be accepted as a sufficient compliance with s. 81 of the Probate Act, 1857.

On December 29, 1880, Thomas Richardson Paton died intestate and a bachelor, being at the time entitled, along with his brother, James Spence Paton, subject to the life interest of their mother, to the residuary estate of their late father, who died in 1864. The mother and brother were the sole next of kin and the only persons entitled in distribution to his estate.

On February 18, 1890, James Spence Paton, the brother, died, a bachelor and intestate, leaving his mother his sole next of kin and the only person entitled to his personal estate.

The sole property of Thomas Richardson Paton and of his

(1) A monition in pursuance of this sentence was subsequently served on the defendant.

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brother consisted of the reversion under their father's will, and the necessity for administration did not arise in either case until after the death of their mother, which occurred on February 6, 1901.

Probate of her will was granted in the Principal Probate Registry on February 18, 1901, to Edmund Taylor and Henry Wilding, the executors therein named, they being also the present trustees of the father's will.

The said executors and trustees of those wills were now applying or about to apply for a grant of letters of administration to Thomas Richardson Paton's estate, and they intended also to apply for a grant to the estate of the brother, James Spence Paton. Upon those grants being made, they would be legally entitled to receive, as the legal personal representatives of those persons, the residuary estate of Edward Fraser Paton, the father, and thereupon to receive the same as executors of Mrs. Paton.

All debts owing by Thomas Richardson Paton and James Spence Paton at the dates of their respective deaths, as well as their funeral expenses, had long since been paid.

Priestley, for the applicants, now moved to dispense with sureties. The case of *In the Goods of De la Farque* (1) is the nearest authority.

THE PRESIDENT. I think I may accede to the application. The case you cite affords some authority for doing so.

Solicitors: *Field, Roscoe & Co., for Alsop, Stevens & Co., Liverpool.*

(1) (1862) 2 Sw. & Tr. 631.

H. D. G.

1901
May 6.

In the Goods of LOUIS SCHOTT.

Probate—Practice—Will—Residuary Clause—Clerical Error—Motion to Rectify—Order to Strike out Words—Refusal to Insert another Word.

Upon an application to rectify a clerical error in the residuary clause of a will:—

Held, that words might be struck out, but that no fresh word could be inserted.

In the Goods of Bushell, (1887) 13 P. D. 7, and *In the Goods of Huddleston*, (1890) 63 L. T. 255, disapproved.

Motion to rectify a clerical error in a will, by substituting the word "residue" for the word "revenue" in the fifth line of the second sheet thereof.

By the will the testator, Louis Schott, late of 4, Bank Buildings, Lothbury, in the City of London, after making certain specific bequests and appointing executors and trustees, devised and bequeathed all his real and personal estate not thereinbefore specifically disposed of to his trustees upon trust for sale and conversion as therein directed, and after payment of his debts and funeral and testamentary expenses and the specific legacies bequeathed by the will or which might be bequeathed by any codicil thereto, "to stand possessed of the nett *revenue of the said* proceeds" upon the trusts therein declared.

From the affidavit of the testator's solicitor, it appeared that in the month of April, 1900, the testator consulted him with reference to certain alterations which he desired to make in his then existing will and codicils, and an epitome was prepared and sent to him by the solicitor shewing the provisions contained in those documents.

In the margin of this epitome the testator wrote memoranda of his wishes. The instructions as to the residue were "to leave to Mrs. B." (the testator's only sister) "the residue with income to her during her life, and upon her death to go to her children in equal proportions on condition that such shares

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should be held in trust, for which purpose a trust to be established."

In his previous will the testator had given the residue to his sister absolutely if she should survive him; but if she predeceased him the residue was to be divided equally among such of her children as should be living at the date of the testator's death.

In pursuance of the instructions, the solicitor dictated a draft will to a shorthand writer, and about May 16, 1900, sent to the testator a fair copy of the transcribed draft. The testator subsequently communicated with his solicitor's firm and caused to be made certain alterations not affecting the gift of the residue, the instructions as to which he never changed.

The draft will was engrossed, and on May 24, 1900, it was sent to the testator, who sent for his solicitor, and subsequently executed the will on May 30, 1900.

The testator died on February 28, 1901, and subsequently it was discovered that a clerical error had crept into the draft will, and had been repeated in the engrossment, the word "revenue" having by mistake been written instead of the word "residue" in the direction to the trustees to stand possessed of the nett proceeds of the testator's residuary estate upon trust for investment.

So far as the solicitor had been able to ascertain, neither the draft will nor the engrossment was read over to the testator, and the discrepancy between the instructions and the will as executed was not brought to his notice.

The three sons of Mrs. B., all of whom were said to be over twenty-one, consented to the application and to the case being disposed of on motion.

Priestley, for the trustees and executors of the will, moved to strike the word "revenue" out of the residuary clause and to substitute the word "residue." As it stands a perfectly nonsensical reading is given to the clause.

[JEUNE P. I can strike out words, but I cannot insert anything.]

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In the Goods of Bushell (1) is an authority for inserting one word instead of another.

[JEUNE P. That has not been followed in practice.]

In a reported case, decided three years later, it was followed: *In the Goods of Huddleston.* (2)

JEUNE P. Both of the cases cited were decided by the same learned judge. I am afraid that it must be admitted that upon this point of probate practice the late Sir Charles Butt was heretical. I find that a note has been put, in manuscript, in the margin of *In the Goods of Bushell* (1) in my copy of the LAW REPORTS. It is in these words: "By the President's direction this is not to be followed. Note of order of judge may be put in margin of probate." The President at that time was Sir James Hannen, who, I am informed by the registrar, would not allow the order made by Sir Charles Butt to be carried into practice. Under these circumstances, I think that those two decisions of Sir Charles Butt must now be said to be finally disposed of.

I make an order in the present case to strike out the words "revenue of the said" from the residuary clause.

Solicitors: *Bompas, Bischoff, Dodgson, Coxe & Bompas.*

(1) 13 P. D. 7. (2) 63 L. T. 255.

H. D. G.

JOHNSON *v.* JOHNSON (BY HER GUARDIAN AD LITEM).

1901
April 19.

Divorce—"Unreasonable Delay"—Respondent's Insanity—Decree.

The hope or expectation operating in the mind of a husband, that he may be released from the matrimonial tie by the death of his wife, who, after committing adultery, has become insane, may be accepted as a valid excuse and explanation of what would otherwise be "unreasonable delay" in taking proceedings for the dissolution of the marriage.

Considered. LOWE *v.* LOWE [1952] P. 376

HUSBAND'S petition for dissolution of marriage on the ground of his wife's adultery.

Leave to proceed without citing any person as a co-respondent was granted on August 7, 1899.

The parties were married in 1873, and lived together on fairly good terms till March 13, 1888. The petitioner, who had suspicions as to his wife's conduct, then accused her of adultery, which she denied. On April 6, 1888, she left her home, and it was some weeks before the petitioner was able to trace her.

On December 17, 1888, the respondent gave birth to a still-born child, of which the petitioner denied the paternity. At that time the respondent was suffering from a venereal disease, with which the petitioner stated he had not been infected, and of which, when examined, neither he nor his younger child, who was born about 1882, shewed any trace.

In November, 1889, in consequence of reports which reached the petitioner as to the respondent's mode of life, he stopped the allowance of 8*s.* a week which he had made to her, and declined to assist her further.

In November, 1889, she was sent by the magistrates to the workhouse, owing to her state of mind; and in April, 1890, she was removed to Hatton Asylum as a dangerous lunatic. There she had remained ever since as a confirmed lunatic.

The petitioner, at the time the respondent left him, was earning about 3*l.* a week as a machinist, and he had two children to maintain.

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Apart from suggested want of means, an explanation of the delay in taking these proceedings was put forward, to the effect that it was thought to be doubtful whether the respondent would live very long when she was admitted into the asylum. This expectation not being fulfilled, and the petitioner being in better pecuniary circumstances, he filed his petition for divorce on June 1, 1899, alleging adultery with some person unknown on March 13, 1888, and on other days between that date and the month of April, 1890. The birth of the child in December, 1888, was not alleged in the petition; but the condition of that child, as well as of the respondent herself, was urged in support of the charge of adultery.

The official solicitor, as guardian ad litem, filed an answer on behalf of the respondent, denying the adultery and pleading unreasonable delay on the part of the petitioner in presenting and prosecuting the petition.

Priestley, for the petitioner.
Barnard, for the respondent.

JEUNE P. This is a difficult case to decide. It is the law that a divorce may be granted in the unavoidable absence, by reason of mental derangement, of one of the parties. I did not make the law. I am not responsible for it. And I must do the best I can to decide this case, as other cases have had to be decided, without being able to obtain the evidence of the party who is most interested, and who, but for her state of mind, would be best able to give information upon the matter in issue.

It has been pointed out by Mr. Barnard that the mere fact of the birth of a child in December, 1888, would not alone have been sufficient ground for the institution of proceedings for divorce, because it was possible that it might have been the child of the petitioner. But the main fact upon which the petitioner might have relied, as he relies now, is the disease from which both the respondent and her child suffered at the time of the child's birth. That fact is certain, and if the respondent were here she would not, I think, be able to explain

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it. I ought, therefore, to find that she has been guilty of adultery, the evidence before me being to the effect that the petitioner was not suffering from the disease, although the doctor to whom he submitted himself for examination cannot be present to-day.

Then comes the very serious question as to the delay in bringing this suit. That there has been very great delay, there can be no question whatever. It amounts, in fact, to about eleven years. The suggested want of means does not explain it, because the petitioner was in receipt, in 1888, of 3*l.* a week, and his debts amounted to only about 20*l.* and a quarter's rent; and if, under those circumstances, he had determined to take proceedings, he would not have been stopped by want of means. But other and stronger grounds are put forward on his behalf. He was told by some one whom he spoke to—his employer, I think it was—that, before he could proceed, he must find out who the man was with whom the respondent had committed adultery. That seems to be a view which many lay people entertain; but that again, if it stood alone, might not be considered as a valid excuse for such protracted delay as we find in this case. Looking at the matter broadly, there is, to my mind, a far weightier reason. He found that his wife had become insane; that she was suffering from lunacy in a pronounced form, and, from her state of health, he has told me that he thought she might die. Under such circumstances a man might well prefer to wait, in the hope that the hand of death might release her and him, rather than, by taking proceedings to have his marriage dissolved, cast upon his wife the stigma of adultery and thus brand his daughters as the children of an adulteress. That is, in my opinion, a sufficient excuse for the delay. I may add that the reasons why this Court insists on steps being taken promptly, if they are taken at all, and why it should be very strenuous on the subject of delay, are that it is a terrible thing that people should be going about the world, neither married nor unmarried, possibly liable to contract fresh and illegal matrimony, and certainly exposed to temptation to commit adultery. That is a state of things which ought not to be prolonged

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for a moment longer than can be properly avoided. But when one of the parties to a marriage is confined in an asylum as a lunatic, that party, at any rate, is not exposed to such temptations; and, in so far as that party is concerned, the reason for insisting upon prompt action being taken is not so urgent; and a husband or wife who finds himself or herself in the position of this petitioner may be justified in delaying a petition to this Court for a much longer time than would, in ordinary circumstances, be excused. For the reason I have given, I come to the conclusion that the petitioner ought not to be deprived of the remedy which he seeks; and I, therefore, pronounce a decree nisi, with an order for the custody of the younger child of the marriage.

Solicitor for petitioner: *M. A. Orgill, for H. Maddocks, Coventry.*

Solicitor for respondent: *The Official Solicitor.*

H. D. G.

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April 22.

WALPOLE *v.* WALPOLE AND GODDARD.

Divorce—Variation of Settlements—Interests of Next of Kin—Petition to order Reconveyance of Settled Property to Petitioner—Refusal.

By a settlement on his marriage with the respondent the petitioner settled certain property upon trust to pay the income to himself until he should alienate, or attempt to alienate, his interest therein, or until some event should occur whereby the income should become payable to some one other than himself, or until his death, whichever should first happen. The second interest was given to the respondent for her life or widowhood, and (there being no children of the marriage) there was an ultimate trust in favour of the next of kin of the petitioner, but this ultimate trust was only to take effect after the death of the respondent if she should have married again and again become a widow.

In 1899 the petitioner gave a certain undertaking in the Chancery Division to the effect that he would apply forthwith to vary the settlement so as to vest the remainder of the settled property in himself absolutely, and that he would in any event give a charge over all his interests under the settlement. After the decree absolute the petitioner contracted a second marriage, and at the present time, were he to die, the persons entitled to share in his estate under the Statute of Distributions would be the second

wife, the mother, and a nephew and niece of the petitioner, the last two being also beneficially interested in the mortgage of his interest in the settled property.

Upon motion to confirm the registrar's report upon the petition to vary the settlement and to order the reconveyance of the settled property to the petitioner absolutely:—

Held, distinguishing *Meredyth* v. *Meredyth and Leigh*, [1895] P. 92, and *Wynne* v. *Wynne*, (1898) 78 L. T. 796, that this would be going too far, and that the right order to make was simply to extinguish the respondent's interests in the settlement, so that, subject to the engagement given by the petitioner in the Chancery Division, the petitioner's resulting life interest in the settled property would become operative.

MOTION by the petitioner to confirm the registrar's report upon a petition to vary the marriage settlement.

According to the report of the registrar the petitioner (husband) obtained on March 27, 1900, a decree absolute for the dissolution of his marriage, on the ground of the respondent's adultery with the co-respondent. There was no issue of the marriage. The decree nisi had been obtained on April 13, 1899, and the present petition was presented on May 12, 1900. By an ante-nuptial document dated April 21, 1879, certain property was brought into settlement by the petitioner, who took the first interest therein "until he should become bankrupt, or should assign, charge, or otherwise dispose of the same, or attempt" so to do, or "until he should do some other act, or some other event should occur, whereby the income, if payable to himself, would become vested in some other person or persons," or until his death, whichever should first happen. The respondent was to take the second life interest during her widowhood; and, there being no issue of the said marriage, there was an ultimate trust in favour of the next of kin of the petitioner according to the Statute of Distributions, but to take effect only after the decease of the wife if she should have married again and again become a widow.

The trust property now remaining in settlement amounted to about 1400*l.* in value, and consisted partly of a reversion subject to the life interest of Many Ann Walpole, the petitioner's mother.

On December 29, 1899, the petitioner had given an undertaking, embodied in a Chancery order of that date, to the effect

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that he would apply forthwith to this Court to vary the trusts of the ante-nuptial settlement, so as to vest the remaining settled property in himself absolutely; and that he would in any event give a charge for 500*l.*, with interest and costs, on all his interest in that property in favour of certain new trustees appointed under an indenture of settlement dated April 10, 1886.

This undertaking operating as a forfeiture of his interests under the settlement of 1879, the only remaining trust, if the Court varied the settlement by extinguishing the respondent's interests, would then be for the next of kin of the husband according to the Statute of Distributions; but the registrar reported that it was doubtful whether this trust would take effect until after the death of the petitioner, and, if it did not, then there would be a resulting trust in his own favour during his life, which, the registrar supposed, would not be liable to forfeiture, and there were, moreover, the registrar pointed out, the words in the settlement now sought to be varied, to the effect that the trusts in favour of the next of kin were not to operate "until after the decease of the wife if she should have married again and again become a widow." If the petitioner died at the date of the report his "next of kin according to the Statute of Distributions" would mean his present wife (he having married again), his mother, and his nephew and niece; but, in the event of the petitioner having issue by his second wife, the interests of the mother and of the nephew and niece would be defeated. Upon this point the report stated that the interests of these three persons was of a very doubtful character, the second wife's interest being somewhat stronger than that of the nephew and niece.

The concluding portions of the report were in the following terms:—

"The petitioner asks that the Court, following out *Wynne* v. *Wynne* (1) and *Meredyth* v. *Meredyth* (2) (though the cases are not quite the same as the present), will extinguish their interest as next of kin. Catherine Harriett Walpole, the mother and guardian of the niece and nephew (who are also two of the

(1) 78 L. T. 796. (2) [1895] P. 92.

beneficiaries under the settlement dated April 10, 1886, and in whose favour the Chancery undertaking of the petitioner has been given), consents on behalf of her children, inasmuch as an order extinguishing the interest of the next of kin will enable the 500*l.* mentioned in such undertaking to be immediately raised. She considers that this will be more to the benefit of her children than if their interest as next of kin (whatever that interest may be) under the present settlement is preserved.

"A solicitor appeared before me on behalf of the mother of the petitioner. He stated that he had no authority to consent; but he has neither entered an appearance nor put in an answer, and I understand he leaves the matter to the Court.

"The present wife does not consent.

"I have not had the advantage of hearing counsel, and it is only with some hesitation that I suggest that the Court may make an order as asked, extinguishing the rights and powers of the respondent in the settlement dated April 21, 1879, and varying the said settlement so as to vest the property therein comprised in the petitioner absolutely, subject to the life interest of Mary Ann Walpole and subject to the undertaking given by the petitioner in the order dated December 29, 1899, and made in the Chancery Division.

"It should be mentioned that although the consent on behalf of the niece and nephew is before the Court, no formal appearance has been entered on their behalf. The respondent has not appeared in any way on the petition for variation, nor has the present wife of the petitioner entered any appearance; while V. J. Eldred, the sole trustee of the settlement sought to be varied, absconded and has had no notice of this petition. It is a question whether there should be substituted service on him by advertisement or otherwise.

"The parties who appeared before me by their solicitors were the petitioner, his mother, and the new trustees of the settlement of April 10, 1886 (to whom the 500*l.* mentioned in the petitioner's undertaking has to be paid); the two children and their mother. These trustees support the petitioner in his present application."

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Vernon, for the petitioner, after stating the registrar's findings and recommendations, formally moved to confirm the report, pursuant to the undertaking given by the petitioner in the Chancery Division.

J. E. Harman, for the mortgagees and the nephew and niece of the petitioner. If the Court only strikes out the respondent's interest in the settlement, then the mortgagees would have to look to the resulting trust as to the income of the fund which would thereupon come into operation in favour of the petitioner. It is to the interest of every one that they should be paid off. The mother of the petitioner has not appeared.

[THE PRESIDENT. The difficulty I feel is as to extinguishing the interests of next of kin, who may well say they do not like being ousted.]

Wynne v. *Wynne* (1) is the nearest authority. If the Court was justified in deciding that case as it was decided, an order as prayed should be made here. The statute was construed in the widest sense in that case, otherwise the order could not have been made. The next of kin are not yet ascertainable. It cannot be for the benefit of the petitioner that the income should be impounded for a number of years. It is only by an accident that the second wife of the petitioner is interested, namely, through delay in these proceedings.

Mushet, for the present wife of the petitioner, opposed. The next of kin are not ascertainable until after the present wife is dead. She may have issue. The next of kin would be ousted on the birth of a child. The ultimate trust is in favour of the next of kin. The present members of that class take a vested interest, liable to be defeated in certain events.

If the petitioner were to die to-morrow, the present wife would take about 950*l.* out of the 1400*l.* remaining in the settlement. If there should be children, they and she would take the whole property between them. If the wife dies before the petitioner, then Mr. Harman's clients will take 500*l.* The two grounds upon which *Meredyth* v. *Meredyth and Leigh* (2) was decided fail entirely in this instance.

(1) 78 L. T. 796. (2) [1895] P. 92.

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JEUNE P. I am afraid I can hardly deal with this case in the same way as in *Meredyth* v. *Meredyth and Leigh*. (1) The two cases are distinguishable, because here, if the respondent's life interest is extinguished, as admittedly it should be, the petitioner does not himself acquire an absolute interest and has not power to dispose of this property. His next of kin still would have an interest in the property under the Statute of Distributions, and if I were to destroy their interest I should be extinguishing the interest of persons entitled to property and whose conduct is in no way impugned. In the case of *Meredyth* v. *Meredyth and Leigh* (1) I thought that although *Noel* v. *Noel* (2) shewed that the Court will not disturb settlements further than the alteration of circumstances warrants, and will respect the interests of persons whose conduct has not been impugned, still I considered myself justified in going the length of giving the property wholly and absolutely to the petitioner.

So in *Wynne* v. *Wynne* (3) the wife obtained the whole property, and I said: "This settlement gives a possible interest to the next of kin, and the only question which I have to consider is whether I shall be unduly interfering with their interest. The real substance of the settlement is to provide for any children of the marriage, and in default of children to give the petitioner absolute control of the property. There have been no children of the marriage, and the purpose of the settlement has substantially failed." It was only in the event of the wife not disposing of the property that the interests of the next of kin would have come into operation in that case.

In the present case the interests of the respondent must be extinguished; and, subject to the engagement which the petitioner has entered into in the Chancery Division, the petitioner's life interest will become operative. The result of this order will be that during the petitioner's life there will be a resulting trust of the income which will be subject to the charge. I cannot go so far as to direct that the property remaining in the settlement is to vest entirely in him. The

(1) [1895] P. 92. (2) (1885) 10 P. D. 179.
(3) 78 L. T. 796.

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mortgagees may add their costs to their security, unless such costs can be recovered from the co-respondent. The present wife of the petitioner may have an order for her costs against him.

Solicitor for petitioner and his wife: *H. F. Kite.*

Solicitors for mortgagees and for the nephew and niece: *Sharpe, Parker, Pritchards, Barham & Lawford, for H. Male, Birmingham.*

H. D. G.

1901

March 11.

[IN THE ARCHES COURT OF CANTERBURY.]

[APPEAL FROM THE CONSISTORY COURT OF LONDON.]

In re ST. ANSELM, PINNER.

Ecclesiastical Law—Faculty—Jurisdiction—Chancel Screen with Crucifix and Figures of the Virgin Mary and St. John—Architectural Adornment not shewn to be probably open to Abuse—Admission of fresh Evidence on Appeal—Retention of Cause.

A chancel screen to the upper portion of the tracery of which is attached over the entrance archway the figure of Our Lord upon the Cross, and on one side of the archway the figure of the Virgin Mary, and on the other side the figure of St. John, is not either from its character or position in itself unlawful in churches or chapels of the Church of England, and may be authorized by faculty, provided the Ordinary is of opinion in his discretion that it is not probable that the figures on it will be abused for superstitious purposes.

The mere suggestion that the figures on the screen may cause offence is not a sufficient reason for the Ordinary refusing in his discretion to grant the faculty.

The vicar and churchwardens of a parish church in the diocese of London and the chapelwardens of a chapel of ease in the parish petitioned for a faculty to authorize the erection in the chapel of a chancel screen of oak with the figure of Our Lord on the Cross upon the centre of it, and the figure of the Virgin Mary upon one side and St. John on the other: the figures not to surmount the screen, but to be attached to the upper portion of the tracery, the central figure immediately over the entrance archway, and the other two figures, one on the right and one on the left, at a somewhat less elevation, upon pedestals affixed to the woodwork. The grant of the faculty was unopposed, and no evidence was given as to whether the figures on the screen would or would not be likely to be abused by superstitious reverence. The Chancellor of the Diocese of London refused to grant a faculty for the figures on the proposed screen, being of opinion that the erection of a chancel screen with the figures as proposed was illegal in

itself under the ruling of the Arches Court and the Privy Council in *Clifton* v. *Ridsdale*, (1876) 1 P. D. 316; (1877) 2 P. D. 276. The petitioners appealed to the Arches Court.

The Dean of Arches at the hearing of the appeal admitted fresh evidence as to the mode in which the services in the chapel were conducted, and, finding that there was nothing in them to lead the Court to suppose that the proposed screen and figures were likely to be treated otherwise than as an architectural decoration, allowed the appeal, retained the cause, and ordered the faculty as prayed to issue from the registry of the Arches Court.

THIS was a cause of faculty instituted on behalf of Charles Edward Grenside, the vicar, and Thomas Forbes and John Parkhouse, the churchwardens, of the parish of Pinner, in the county of Middlesex and diocese of London, and George T. Skilbeck and Henry S. Colles, the chapelwardens of the chapel of ease of St. Anselm within the same parish, for the purpose of obtaining a faculty to make certain alterations in the chapel of St. Anselm, described in the petition, to lead the faculty as follows: viz., to erect a screen of oak at the entrance to the chancel of St. Anselm's Church in place of a dwarf railing now standing. A design shewing the proposed alterations was annexed to the petition, which further contained allegations that a meeting in vestry duly convened had resolved that the alterations shewn on the design should be carried out, and that the estimated cost of them would be about 450*l.*, and would be given by Mr. Skilbeck, one of the petitioners. From the design annexed to the petition it appeared that to the upper portion of the tracery of the proposed screen, but not surmounting the screen, would be attached immediately over the entrance archway the figure of Our Lord upon the Cross, with, on one side of the archway the figure of the Virgin Mary, and on the other side of the archway the figure of St. John, the figures on either side being placed at a somewhat less elevation from the ground than the central figure, and on pedestals or stands affixed to the woodwork. Above the central figure was the representation of an angel.

The citation in the suit issued out of the registry of the Consistory Court of London on July 28, 1900, and was duly served, but no appearance was entered for any opponent.

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1900. Aug. 16. On this day the cause was heard before the Chancellor of the Diocese of London (Dr. Tristram, Q.C.).

H. C. Richards, Q.C., for the petitioners, moved the faculty.

After oral evidence had been given on behalf of the petitioners in support of the allegations in the petition, the following judgment was delivered by

DR. TRISTRAM. This is an application to the Court to decree a faculty authorizing a chancel screen to be set up in the Chapel of St. Anselm, within the parish of Pinner, with three carved figures on it. The central figure represents our Saviour nailed to the Cross with two side figures, those of the Virgin Mary and St. John. The Court entertains no objection to the granting of a faculty for the erection of the chancel screen without the figures, but it must decline to sanction the erection of the figures on the screen on the grounds stated by Lord Penzance in the Arches Court in the case of *Clifton* v. *Ridsdale* (1), which were concurred in on appeal by the Judicial Committee of the Privy Council. (2) In that case a faculty had been granted in the Commissary Court of the Archbishop of Canterbury for the erection of a chancel screen without any mention that there was to be surmounted on it a crucifix. The actual screen as erected is described by Lord Penzance as one "of open ironwork some nine feet high, stretching across the church at the entrance to the chancel; the middle portion of this screen rises to a peak and is surmounted by a crucifix, or figure of our Saviour on the Cross in full relief and about eighteen inches long. . . . . The screen, of course, from its position directly faces the congregation, and the sculptured or moulded figure of our Lord is turned towards them": *Clifton* v. *Ridsdale*. (3) There was a row of candles on the top of the screen, which when lighted illuminated the screen. The question for the consideration of the Court of Arches was whether this crucifix could be treated as a mere architectural decoration

(1) 1 P. D. 316. (2) 2 P. D. 276.
(3) 1 P. D. 316, at p. 353.

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when so placed and lighted with candles not wanted for the purpose of light, or was in danger of being an object of "superstitious reverence." "The best forecast of the future," Lord Penzance observed, "in most cases, but especially in those wherein the weaknesses and failings of mankind are concerned, is to be obtained from the experience of the past"; and, after referring to historical documents as producing unquestionable evidence that the rood in some form or other was in universal existence in English churches before the Reformation, and that during the reign of Queen Elizabeth these roods and rood-lofts were destroyed far and wide as monuments of idolatry and superstition, proceeded as follows: "From all this it is plain that the crucifix formed an ordinary feature in the parish church before the Reformation; and it cannot be doubted that it did so, not as a mere architectural ornament, but as an object of reverence and adoration. If any proof was required of this proposition, it may be found in the fact that the worship of it was enjoined in the Sarum Use, the missal most largely accepted and used in England before the Reformation. . . . . Such is most briefly the part played by the 'rood' or crucifix in English churches in the past. If set up again in them now, what part is it likely to play in the future? It is no doubt easy to say, What proof is there of danger of idolatry now? What facts are there to point to a probability of 'abuse'? But when the Court is dealing with a well-known sacred object—an object enjoined and put up by authority in all the churches of England before the Reformation in a particular part of the church and for the particular purpose of "adoration"—when the Court finds that the same object both in the church and out of it is still worshipped by those who adhere to the unreformed Romish faith, and when it is told that now, after a lapse of three hundred years, it is suddenly proposed to set up again the same object in the same part of the church as an architectural ornament only—it is hard not to distrust the uses to which it may come to be put, or escape the apprehension that what begins in 'decoration' may end in 'idolatry.' If this apprehension is a just and reasonable one, then there exists that likelihood and danger of 'superstitious reverence' which

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the Privy Council in *Phillpotts* v. *Boyd* (1) pronounced to be fatal to the lawfulness of all images and figures set up in a church": *Clifton* v. *Ridsdale.* (2) And farther in the judgment his Lordship says: "What I am here discussing, I must again repeat, is not the belief in an idol of wood and stone, but the practice of involving in devotional exercises outward and visible forms as inculcated in the devotional books of the Roman Catholic creed. This is the 'fond thing vainly invented' of the 22nd Article of Religion; and the mere fact of the existence of such a doctrine in that Church, among whose members high intellectual power and acquirement are rife, is to my mind a conclusive answer to the suggestion that the intellect or knowledge of the present day may be relied upon to take the place of those safeguards which it was the work of the Reformation to establish. But another consideration must not be lost sight of. If the intelligent and the cultivated no longer need the protection of old days, can the same be said of the weak and ignorant? The parish church is for all, not for a class; and if the crucifix placed as it is in this instance is lawful for St. Peter's Church it is lawful for every parish church in the country, and may be provided for every congregation—strong-minded or weak—instructed or ignorant. . . . . Upon the whole, then, I must declare that the crucifix surmounting the screen in this case has not been shewn, to my satisfaction, to have been set up as an architectural decoration only, and that there does exist a danger and likelihood that it may be the object of 'adoration' and 'superstitious reverence.' This conclusion makes it unnecessary to consider whether its erection was originally covered by the faculty which was obtained for the iron screen; and the Court must now order it to be removed; but a removal of the figure leaving the cross standing will be a compliance with this order": see *Clifton* v. *Ridsdale.* (3) The Judicial Committee, in delivering judgment in the same case on appeal, cited portions of the passages I have read from Lord Penzance's judgment, stating that in those observations of the learned judge they concurred, and selected them as the grounds of his decision

(1) (1875) L. R. 6 P. C. 435. (2) 1 P. D. 316, at pp. 353, 356.
(3) 1 P. D. 316, at pp. 357, 359.

which commended themselves to their judgment, and under the circumstances of the case affirmed his decision on this point: see *Ridsdale* v. *Clifton*. (1) I have cited those passages in Lord Penzance's judgment which appear to me to be most pertinent to the question now under the consideration of the Court, inasmuch as the Chancellor of the Diocese of St. Albans in *The Vicar and Churchwardens of Great Bardfield* v. *All having Interest* (2) held, that if a Chancellor was satisfied that the figure of a crucifix was erected on a chancel screen in a church where it was not likely to be used superstitiously, he was at liberty, notwithstanding the above judgment, under special circumstances, in the exercise of his discretion, by faculty to sanction its erection on the ground, amongst others, that Lord Penzance from his observations in *Clifton* v. *Ridsdale* (3) was greatly induced to make the order he did with reference to the crucifix on the chancel screen in that case owing to the presence of the Stations of the Cross in the church of St. Peter's, and to the figure on the screen being illuminated by candles on either side of it, which were lighted when they were not required for the purpose of giving light, and to other accessories in the service of that church, whilst the Chancellor of the Diocese of Norwich, in the case of *The Vicar and Churchwardens of St. John the Baptist, Timberhill* v. *The Rectors, &c., of the Same* (4), declined to grant such a faculty. The Chancellor of the Diocese of Rochester, in the case of *The Vicar of Richmond and Others* v. *All persons having Interest* (5), also refused such a faculty, being of opinion that it was decided in *Clifton* v. *Ridsdale* (6) by the Dean of the Arches and the Judicial Committee of the Privy Council that a crucifix with or without figures placed on the top of a chancel screen cannot, on account of its special history and significance in that position, be regarded as a merely architectural decoration, as it might perhaps be in a reredos, and that faculties for crucifixes with or without figures so placed ought not to be granted. And it is also matter for observation that, assuming that an

(1) 2 P. D. 276, at pp. 349, 353.
(2) [1897] P. 185.
(3) 1 P. D. 316.
(4) [1895] P. 71.
(5) [1897] P. 70.
(6) 1 P. D. 316; 2 P. D. 276.

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incumbent applying for such a faculty would not himself sanction a crucifix so placed to be used superstitiously, it is not in his power to prevent persons attending the services of his church, or clergy temporarily officiating in it, or his successors, if so minded, from thus using it, which is a further reason why, in my judgment, such faculties ought not to be granted. I may mention *The Christ Church, Leeds, Case* (1), where, sitting as Chancellor of the Diocese of Ripon, I ordered a crucifix to be removed although there was no evidence that it was superstitiously used by the parishioners. There was evidence that on the occasion of a harvest festival a lady, not a parishioner, came into the church and, seeing the Stations of the Cross, so conducted herself, by kneeling or making obeisance before the figure of our Saviour, as to shew that she was using it superstitiously. Again, I may mention the case of *Kensit and Others* v. *The Rector and Churchwardens of St. Ethelburga, Bishopsgate Within* (2), where there was a crucifix by the side of the pulpit. It had been used by one of the curates of that church for several years superstitiously. The curate who had so used it retired from the parish, and another clergyman was temporarily put in charge of the parish by the Bishop of London. This last-mentioned clergyman certainly did not use it superstitiously, but during the tenure of his office a clergyman, said to be a Colonial clergyman, on preaching a sermon in the church, observing the crucifix, both on going up to the pulpit and on retiring from it took off his biretta and made obeisance to it. I might also state that the case of St. Mark's, Marylebone Road—*The Vicar of St. Mark's, Marylebone Road* v. *The Parishioners of the Same* (3)—came before me, in which I ordered that the Stations of the Cross should be removed from the church. There the crucifix was not only superstitiously used, but there was a figure of the Virgin Mary in the church, so placed that persons who went into the church would probably use the crucifix superstitiously. If they would do one thing, they would probably do the other. But, furthermore, if a Chancellor has a discretionary power to grant such a faculty

(1) November 9, 1898; not reported. (2) [1900] P. 80.
(3) [1898] P. 114.

as is asked for in this case, I should decline to grant such a faculty on the ground that parish churches and parish chapels and the services in them are provided for the use of all persons, whether permanently or temporarily resident in the parish, whatever may be their theological views, and that the introduction of such an ornament would give offence to many lay members of the Church of England, and mark the church as a ritualistic instead of a National Church, such as was contemplated by the settlement at the Reformation, and might prevent parishioners from attending the services of their parish church.

On these grounds I decline to grant the faculty as prayed.

As I understand that the petitioners do not desire a faculty for the screen without the figures, I dismiss the application for the faculty.

Against the decree entered in pursuance of this judgment, the petitioners appealed to the Arches Court of Canterbury.

The inhibition and citation in the appeal, whereby the parishioners and inhabitants of Pinner were cited to enter an appearance in the registry of the Arches Court and answer to the appellants in their cause of appeal, having been duly served, the appeal came on to be heard on February 26 last before the Dean of Arches (Sir Arthur Charles).

H. C. Richards, K.C., on behalf of the appellants. The appeal in this case ought to be allowed, and the faculty applied for granted. The judge of the Court below, acting on a wrong understanding of the decision in *Clifton* v. *Ridsdale* (1), has not exercised the judicial discretion he was bound to exercise under the ruling in that case and in the Exeter Reredos Case—*Phillpotts* v. *Boyd* (2)—and has not drawn the inference he ought to have done on the undisputed facts before him, that the screen and figures in this case would not be likely to be abused by superstitious reverence, it being clear that they are entirely different in character and surroundings from the isolated crucifix declared illegal in *Clifton* v. *Ridsdale*. (1) No objection has been raised to the proposed screen by any of the

(1) 1 P. D. 316; 2 P. D. 276. (2) L. R. 6 P. C. 435.

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parishioners of the parish; but even if it were otherwise, it would be an erroneous test of whether a faculty ought to be granted to inquire whether the proposed screen and figures would be likely to give offence to any members of the Church of England. The proposed screen and figures are either lawful or unlawful, and if they can lawfully be erected in this chapel it is quite immaterial that thereby offence may be given. To hold otherwise would be to condemn even painted windows such as the well-known window in St. Margaret's Church, Westminster, held lawful in *Peirson* v. *Gell*. (1) But not only has the judge of the Court below neglected to exercise his discretion in this case, but he has held that the proposed figures are per se illegal quite independently of whether there is a probability of their being abused or not. No decision of this Court or of the Privy Council has so decided. In *Westerton* v. *Liddell* (2) there was no decision as to the illegality of the crucifix; whilst in *Clifton* v. *Ridsdale* (3), though the crucifix on the chancel screen in that case was not sanctioned, the decision on that point had no reference to crucifixes generally considered, as this crucifix must be considered, as an architectural decoration, and a portion of the representation of a scriptural scene not liable to have superstitious reverence paid to it, and therefore lawful in a chapel of the Church of England under the principle laid down in *Phillpotts* v. *Boyd* (4) and *Hughes* v. *Edwards*. (5) In considering whether the crucifix in *Clifton* v. *Ridsdale* (3) was probably liable to abuse, Lord Penzance laid great stress on passages in the Sarum Missal, Burntisland, ed. A.D. 1861, p. 262, and Rock's Church of Our Fathers, vol. ii. p. 229, quoted to prove the adoration of the rood in the service on Palm Sunday; but it may well be contended that, as described in the passages quoted, adoration was paid to the Sacrament or sacred relics carried in procession, and not to the rood or crucifix on the chancel screen: *Clifton* v. *Ridsdale*. (6) In the view taken in the Consistory Court of

(1) (1868) Rothery's Return of Ecclesiastical Appeals, No. 85, p. 171.
(2) (1857) Moore's Special Report.
(3) 1 P. D. 316; 2 P. D. 276.
(4) L. R. 6 P. C. 435.
(5) (1877) 2 P. D. 361.
(6) 1 P. D. 316, at p. 356.

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the illegality of the crucifix in itself, no affirmative evidence was given there of the absence in the mode of conducting the services in St. Anselm's of anything which would render it probable that the figures on the screen would be abused; but not only would the appellants, if it be thought necessary, be ready to add on the proposed screen additional figures to make the representation of the Crucifixion as an historical scene more accurate, but they are able to shew affirmatively that there are no practices in use in the chapel which could be disapproved of as illegal, and are prepared to supplement the evidence in the Court below on any point on which the Court might allow fresh evidence to be given.

[He also referred to art. 3 of the Articles of Inquiry set forth at the Primary Visitation of the Right Rev. Father in God, Dr. Richard Montague, sometimes Bishop of Norwich—Rivington, Cambridge, 1841, p. 43—as to the legality of chancel screens with gates: *Reg.* v. *The Bishop of London* (1); *Read* v. *The Bishop of Lincoln.* (2)]

[THE DEAN OF ARCHES. I think it would be desirable to have some further evidence before me as to the details of the proposed screen, and some evidence as to the arrangements of the chapel and as to how the services there are conducted.]

The donor of the proposed screen and the vicar of Pinner were then called as witnesses and examined by the Court. The former of these witnesses stated that all the figures on the proposed screen would be of wood, and none of them except a small figure of an angel, represented as in prayer or weeping, would be above the top of the screen; that the figure of our Lord upon the Cross would be fixed to the screen by pegs of wood at the hands and feet; that there were to be neither gates to the screen nor means of access to the top of it; and that in the east window over the Communion Table there was a representation of the Incarnation of Our Lord, and above the Communion Table a cross. He also stated that the chapel was a chapel of ease without a district served by the clergy of the parish church of Pinner. The vicar of Pinner gave

(1) (1889) 24 Q. B. D. 213; [1891] A. C. 666. (2) [1891] P. 9.

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evidence to the effect that he was responsible for the conduct of the services in the chapel; that he had never received any intimation from the bishop of the diocese with regard to any alteration to be made in the services, nor any complaint in respect to them, they having always been such as were authorized by law; and that the clergy did not wear the eucharistic vestments or copes, and did not use incense even for purposes of fumigation.

Cur. adv. vult.

1901. March 11. SIR ARTHUR CHARLES. This is an appeal from the refusal of the Chancellor of the Diocese of London to decree a faculty authorizing a chancel screen of oak to be set up in the chapel of St. Anselm, in the parish of Pinner, with the figure of Our Lord on the Cross upon the centre of it, and the figure of the Virgin Mary one side and of St. John on the other. The drawing annexed to the petition for the faculty shews that it is not intended that any of these figures should surmount the screen. It is proposed that they should be attached to the upper portion of the tracery, the central figure being placed immediately over the entrance archway, and the other two on the right and on the left, at a somewhat less elevation, upon pedestals or stands affixed to the woodwork. The appellants who apply for the faculty are the vicar and churchwardens of the parish church and the chapelwardens of the chapel, one of whom is the donor of the screen. No opponent appeared in the Court below, nor was there any opposition on the hearing of the appeal. The learned judge, however, declined to sanction the erection of the figures on the screen "on the grounds stated by Lord Penzance in the Arches Court in the case of *Clifton* v. *Ridsdale* (1), and which were concurred in on appeal by the Judicial Committee of the Privy Council." (2)

If this view of that decision be correct this appeal must fail, for this Court is unquestionably bound to respect and follow, in regard to any matter which may come before it for adjudication, the direct ruling thereon of the Judicial Committee. My

(1) 1 P. D. 316. (2) 2 P. D. 276.

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first duty, therefore, must be to consider what was really decided in the case referred to; and that the inquiry is one of no small difficulty is obvious from the very different and antagonistic opinions as to the meaning of the judgment which have been from time to time expressed by Diocesan Courts. Thus, for example, in *The Vicar of Richmond and Others* v. *All having Interest* (1), the Chancellor of the Diocese of Rochester says with reference to the case (2): "I understand that case to have decided that a crucifix, with or without figures, placed on the top of a chancel screen cannot, on account of its special history and significance in that position, be regarded as a mere architectural decoration, as it might perhaps be in some other position, as, e.g., in a reredos, and that faculties for crucifixes with or without figures so placed ought not to be granted." On the other hand, in *The Vicar and Churchwardens of Great Bardfield* v. *All having Interest* (3), the Chancellor of the Diocese of St. Albans dissented from this interpretation of the decision, observing (4) that he could not persuade himself that their Lordships or the Dean of the Arches had any intention to decide that under no circumstances whatever could a representation of the Crucifixion on a chancel screen be lawful. The same view had previously been taken by the Chancellor of the Diocese of Norwich, who, in the case of *The Rector and Churchwardens of Barsham* v. *The Parishioners of the Same* (5), sanctioned a crucifix with the accessory figures of the Virgin Mary and St. John, there being nothing in the church in the nature of a rood-loft or rood-stairs, and nothing in the conduct of the services, to lead to the conclusion that any superstitious reverence would be paid to the figures on the screen. The same learned judge, it should be observed, had on another occasion disallowed a similar combination of figures erected on a beam above a chancel screen, which itself was surmounted by a loft or gallery approached from the floor of the church by an old staircase in the wall. Upon the evidence produced before him of the mode in which the services of the church

(1) [1897] P. 70.
(2) [1897] P. 70, at p. 77.
(3) [1897] P. 185.
(4) [1897] P. 185, at p. 196.
(5) [1896] P. 256.

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were conducted, and especially of the use of the loft on Palm Sunday, he thought that there was danger of superstitious reverence being paid to the figures so placed: *The Vicar and Churchwardens of St. John the Baptist, Timberhill* v. *The Rectors, &c., of the Same* (1); and upon that ground he held them to be unlawful within the ruling of the Arches Court and Judicial Committee in *Clifton* v. *Ridsdale*. (2)

I have referred to these four cases, among others, because they illustrate very clearly the two conflicting views which have been taken in the Courts below of the decision in question. According to one view it prohibits the crucifix on a chancel screen altogether, whether with or without accessory figures, and no matter what may be the character of the services of the church in which it is proposed to erect it. According to the other, a crucifix with the figures of the Virgin Mary and St. John —in other words, a sculptured representation of the Crucifixion —may lawfully be erected on such a screen where there are no circumstances to indicate or suggest the probability of worship, adoration, or superstitious reverence being paid to the figures of the group. Now, in order to appreciate the true meaning and effect of the judgments of this Court and of the Court of Appeal in *Clifton* v. *Ridsdale* (2) it is, in my opinion, necessary shortly to advert to the two earlier cases which both Courts considered to have a material bearing on the question before them. The first of these was *Westerton* v. *Liddell* (3), decided in 1857. In that case, Dr. Lushington in the Consistorial Court, and Sir John Dodson in the Arches Court, had held that crosses on the Communion Table and on the chancel screen were illegal—Dr. Lushington on the ground that they were not within the protection of the "ornaments" rubric, and Sir John Dodson on the ground that they were forbidden under the term "images" by the Royal Injunctions of 1547 and the Act 3 & 4 Edw. 6, c. 10, "for the abolishing and putting away divers books and images."

The Judicial Committee, however, sanctioned the retention of the cross on the chancel screen, being of opinion that crosses

(1) [1895] P. 71. (2) 1 P. D. 316; 2 P. D. 276.
(3) Moore's Special Report.

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not used in the services, but employed only as decorations of churches, were entirely unaffected by the "ornaments" rubric, and, further, that they were not included among the images forbidden by the Injunctions and statute. And this conclusion was arrived at although, as is stated in the judgment, crosses before the Reformation had been abused as well as crucifixes and images of saints. But nothing was decided in this case as to the legality of a crucifix, and, indeed, in that part of the judgment which deals with the reasoning of Sir John Dodson, it is pointed out that there is a wide difference between the cross and images of saints, and even, though in a less degree, between a cross and a crucifix: Brooke, Privy Council Judgments, p. 56. The importance of the decision, so far as regards the matter now under discussion, consists in the fact that crosses used as mere emblems of the Christian faith, and not as objects of superstitious reverence, may still lawfully be erected as architectural decorations: Brooke, Privy Council Judgments, p. 65.

In *Phillpotts* v. *Boyd* (1) the Judicial Committee adhered to the principle laid down in *Westerton* v. *Liddell* (2), and applied it to a reredos in Exeter Cathedral, on which was a sculptured work in three compartments, representing, in the centre, the "Ascension," and, on the right and left sides respectively, the "Transfiguration" and the "Descent of the Holy Ghost" on the day of Pentecost.

In an elaborate judgment their Lordships reviewed the legislation respecting images from the issue of the Royal Injunctions of 1547, the Mandate or Order of 1548 (see Cardwell's Documentary Annals, vol. i. pp. 17, 47), and the passing of the Act 3 & 4 Edw. 6, c. 10, down to its revival in the reign of James I., after its temporary repeal by 1 Mary, st. 2, c. 2. They pointed out that the statute might be regarded as a recognition by the Legislature of the orders previously given for the removal of all images which were then standing in churches, either when they had been abused or whether they had been abused or not; but they add that it appeared to them "that the efficacy of the Act was spent

(1) L. R. 6 P. C. 435. (2) Moore's Special Report.

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upon the definite purpose to which it was directed, and that the Legislature did not thereby make or intend to make provisions in respect of the subsequent use or abuse of any other images." Further, they remarked that the Injunctions and Proclamations of Elizabeth (Cardwell, Documentary Annals, vol. i. p. 221, 290) were directed against "pictures, paintings, and all other monuments of feigned miracles, pilgrimages, idolatry and superstition," and against "monuments of idolatry and false feigned images," and that the language thus used was plainly addressed to that limited class of monuments only which was tainted with falsehood and superstition. The same observation was applicable, they considered, to the twenty-second Article of Religion, which condemns not the use, but only the abuse of images. In the result the conclusion arrived at was that sculptured representations of sacred subjects, if set up for the purposes of decoration only, are not in themselves unlawful in the Church of England; but they are unlawful if set up under circumstances which induce a just and reasonable apprehension that they are likely to be made the object of superstitious reverence and regard.

Taking, then, the principles laid down in these two authorities for my guidance, I pass on to an examination of the case of *Clifton* v. *Ridsdale*. (1) There a large number of ecclesiastical offences were alleged against the defendant in the conduct of the services, with regard to some of which it should be noticed no defence was offered, and to which it is not necessary to refer in detail. The two charges which are directly relevant to the present inquiry were as follows: (1.) The erection on the top of the chancel screen of a crucifix and twenty-four metal candlesticks with candles in them, which at the ordinary evening service were lighted upon either side although the other lights in the church were amply sufficient; and (2.) the setting up on the walls of the church certain figures in coloured relief representing scenes of the Passion, and forming what are commonly called 'Stations of the Cross,' such as are used in Roman Catholic churches, and partly relating to legendary scenes not part of the Gospel history, and tending as a whole to

(1) 1 P. D. 316; 2 P. D. 276.

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encourage ideas of an unauthorized and superstitious kind. As to this second article of charge, the learned judge received evidence which satisfied him that the "Stations" were likely to be turned to superstitious uses. He accordingly ordered their removal, and from this part of his judgment there was no appeal to the Judicial Committee.

With regard to the crucifix, after dismissing the suggestion made in the argument that the position of the candles and the manner in which they were lighted constituted a "ceremonial" observance, he went on to consider whether a crucifix, "placed and lighted" as this one was, was in danger of being an object of superstitious reverence. He lays stress on the fact that, like the "rood" ordinarily found in parish churches before the Reformation, it was placed in high relief on the top of the middle portion of the screen, and also on the fact that when the candles were lighted it would stand out in a full light. He then refers to the destruction of crucifixes or roods as monuments of idolatry in the reign of Elizabeth, and to the circumstance that the worship of the rood was enjoined by the Sarum Missal in the order for service on Palm Sunday, and, proceeding upon these considerations, declared that the crucifix surmounting the screen in this case had not been shewn to his satisfaction to have been set up as an architectural decoration only, and that there did exist a danger of its being abused. He arrived at this conclusion both as to the Stations of the Cross and the crucifix, without regard to the manner in which the defendant was in the habit of conducting his services, although, he added, it was obvious enough the defendant's methods were such as largely to augment the probability of abuse. I ought not to omit to notice that, in criticising the argument that the crucifix was merely intended to serve as an architectural decoration, the learned judge points out the distinction which exists between the crucifix alone and the crucifix associated with other figures and as embodying the scene of the Crucifixion. The Judicial Committee, upon appeal, affirmed this decision. But in giving the reasons for their judgment they drew special attention to the fact that the learned judge was "dealing with a church in which was found, not merely an illuminated

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crucifix, but also the Stations of the Cross, and other acts in the conduct of the services the illegality of which the defendant did not challenge in his appeal." (1) And they added that, whilst prepared under the circumstances of the case to affirm the order directing the removal of the crucifix, they thought it "important to maintain as to representations of sacred persons and objects in a church the liberty established in *Phillpotts* v. *Boyd* (2), subject to the power and duty of the Ordinary so to exercise his judicial discretion in granting or refusing faculties as to guard against things likely to be abused for purposes of superstition." (3) These significant expressions seem to me to indicate plainly that their Lordships had no intention to decide, and did not decide, that a representation of the Crucifixion on a chancel screen could under no circumstances whatever be lawfully erected. I am unable, therefore, to agree with the construction placed by the learned judge of the Court below upon their decision. In my opinion, it leaves me free to consider whether, upon the principle laid down in *Phillpotts* v. *Boyd* (2) and emphatically approved in *Clifton* v. *Ridsdale* (4), the sculpture proposed to be erected in the present case is likely to be made the object of superstitious reverence, or whether it may properly be regarded as an architectural decoration and nothing more.

Now, in coming to a conclusion as to which of these two alternatives I ought to adopt, the first point to be noted is that any probability of abuse which may exist must arise from the character, nature, or proposed position of the thing itself, for there is nothing in the furniture or arrangements of the church or in the mode in which the services are conducted to warrant such an inference. The information given to me at the hearing by the donor and the vicar entirely satisfied me that the law, both in regard to the services and in regard to the ornaments of the church and the minister, has always been loyally obeyed. The case in this respect resembles that of *Hughes* v. *Edwards* (5), which was decided in this Court by Lord Penzance very

(1) 2 P. D. at p. 352.
(2) L. R. 6 P. C. 435.
(3) L. R. 2 P. D. 276, at p. 353.
(4) 1 P. D. 316; 2 P. D. 276.
(5) 2 P. D. 361.

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shortly after the decision of the Judicial Committee in *Clifton* v. *Ridsdale*. (1) There the question was as to a sculptured representation of the scene of the Crucifixion in the centre of a reredos in Denbigh Church. But there, as here, there were no extraneous facts brought before the Court upon which to exercise its discretion. There was, however, an appearance entered for a resident parishioner who objected to the issue of the faculty on the ground that the sculpture in such a situation was illegal, that it could not be regarded as a mere architectural adornment, but would be in danger of abuse, and, further, would be likely to cause scandal and offence. But he offered no evidence from which such a conclusion could be drawn. His opposition was based solely on the alleged illegality of the thing itself so placed. He contended that by reason of its character and position it would be likely to receive superstitious reverence. If he were right in that contention, then—said the learned judge—" the faculty must be refused,—if not, nothing remains upon which to exercise a legitimate discretion in refusing it." (2) The learned judge accordingly proceeded to examine the question of legality. He pointed out the distinction between the case before him and *Clifton* v. *Ridsdale* (3), where, he observed, " the crucifix could hardly be said to constitute an architectural decoration at all, or at any rate did not appear in the opinion of the Court to have been set up for that purpose " (4), and in the result rejected the argument which had been strenuously pressed upon him, that the figure of Christ on the Cross contained in the central compartment of the sculpture under consideration would, in a Roman Catholic church, properly supply the place of a crucifix on the altar, and that, therefore, in this church, it was likely to fulfil the same office and so be open to danger of abuse. " I think," he says, " it is clear that such a thing might be, but that is not enough ; it must appear to the Court that it is probable." (5) On this probability, in the absence of any collateral or ancillary facts to help him, he was unable to adopt an affirmative conclusion,

(1) 2 P. D. 276.
(2) 2 P. D. 361, at p. 367.
(3) 1 P. D. 316 ; 2 P. D. 276.
(4) 2 P. D. 361, at p. 363.
(5) 2 P. D. 361, at p. 369.

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and he sums up the whole matter in the following words: "The proposed erection is a fitting and natural architectural ornament. It is proposed to be placed in a part of the church where ornaments of the kind are not infrequently found. It is not an isolated figure, but a group capable of artistic treatment. It differs only from a very similar erection which has been held lawful at Exeter, in the circumstance that it portrays the Crucifixion in the place of the Ascension, and it differs not at all in essentials from other representations of the Crucifixion which have hitherto been found harmless, such as that which has stood for so many years in St. Margaret's Church, Westminster. Why, then, without more, it may be asked, why without further evidence should the probability of its abuse to superstitious uses be declared to be established? I do not conceal from myself that this question is one in which there is room for much difference of opinion; but a great deal depends on the attitude of mind in which the subject is regarded: things innocent in themselves soon take another complexion if viewed in a spirit of distrust, and the possible soon passes into the probable under the eyes of an over jealous vigilance. Dispassionately considered, the circumstances of the case require me to declare that the illegality of this decoration is not established, and that a faculty for its erection ought to be granted." (1) These observations appear to me to be applicable to the present case. The same suggestion as to the possibility of abuse may be made; but I do not think that without any evidence I ought to declare abuse to be probable. It can be said of the sculptured representation now proposed equally with that sanctioned in *Hughes* v. *Edwards* (2), that it is not an isolated figure, but a group capable of artistic treatment; and its position, though on the chancel screen, is by no means identical with the position occupied before the Reformation by the rood. There is, moreover, nothing in the nature of a rood-loft or rood-beam. Upon the whole, I cannot regard it, either from its character or proposed position, as in itself unlawful; and as no evidence has been given to lead me to suppose that it is likely to be treated otherwise than simply as an archi-

(1) 2 P. D. 361, at p. 370.

(2) 2 P. D. 361.

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tectural decoration, I think that the faculty applied for should be granted. It is no doubt competent to the Court, although the object in question is not actually illegal, to decline to sanction its introduction into the church. But to do so, on the mere suggestion that it may cause offence, would not, in my opinion, be a legitimate exercise of judicial discretion. This appeal must, therefore, be allowed.

Solicitors for appellants: *Stones, Morris & Stone.*

C. F. J.

[IN THE COURT OF APPEAL.]

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Admiralty—Collision—Damage—Towing Lights—Under-way Lights—Control of Tug by Tow—Mersey Rules, 1900, *art.* 4 (*a*)—*Regulations for Preventing Collisions at Sea*, 1897, *art.* 3—*Presumption of Fault—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 419, *sub-s.* 4.

The plaintiffs' steam vessel was lying at anchor in the river Mersey waiting to dock, and, as her engines were broken down, she had a tug fast alongside to hold her up against the flood tide in the event of her anchor dragging. The defendants' steam vessel coming up the river ran into the plaintiffs' vessel, and was found to blame for bad look-out; but the plaintiffs' vessel was also found to blame on the ground that the tug was, at the material time, exhibiting misleading, namely, under-way, instead of towing, lights.

The plaintiffs appealed:—

Held, by the Court of Appeal (Lord Alverstone C.J., A. L. Smith M.R., and Romer L.J.), affirming the decision of Sir F. H. Jeune P., that as the tug was "attached for the purpose of towing or manœuvring" the plaintiffs' vessel within the meaning of art. 4 (*a*) of the Mersey Rules, 1900, she should have exhibited the towing lights prescribed by art. 3 of the Regulations for Preventing Collisions at Sea, 1897. Secondly, that as the misleading lights exhibited by the tug might by possibility have contributed to the collision, the plaintiffs' vessel was to "be deemed to be in fault," for the word "ship" in the clause "the ship by which the regulation has been infringed," in sub-s. 4 of s. 419 of the Merchant Shipping Act, 1894, must be construed to mean the plaintiffs' vessel, the master of which, though in a position to exercise control, had improperly neglected to prevent the tug infringing the regulation.

APPEAL by plaintiffs, in an action of damage by collision, against a decision of Sir F. H. Jeune P. holding their vessel, as well as the defendants' vessel, to blame.

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The case is reported on the question of the construction to be placed on the words "attached for the purpose of towing or manœuvring" in art. 4 (*a*) of the Mersey Rules, 1900 (1), and on the words "the ship by which the regulation has been infringed," in sub-s. 4 of s. 419 of the Merchant Shipping Act, 1894. (2)

The facts, so far as material, were shortly as follows:—

On October 12, 1900, about 10.30 P.M., the Norwegian wooden screw steam vessel *Veritas*, of 485 tons gross register, with thirteen hands, from Krageroe to Liverpool with a cargo of ice, was lying in the Mersey with a Liverpool pilot on board, and her starboard anchor down. The weather was fine and clear with a moderate westerly breeze, and the tide was about half flood running about three knots. The *Veritas* had been towed into the river that morning with her engines broken down, and her master had engaged two tugs at tariff rates to take the vessel into dock when there was sufficient water. In the meantime, as the holding ground was not very good, he had arranged with one of the tugs, the *Prairie Cock*, of 25 tons register, 90 horse-power, and about 90 feet long, that she should receive 3*l.* extra for standing by and being ready to hold the *Veritas* up against the tide, or ease the strain, in case her anchor dragged. The *Prairie Cock* arrived about 7 P.M., and (according to the finding of the Court) was attached on the starboard side of the *Veritas* fore and aft by a 7-inch rope sufficiently strong to serve as a towing hawser if necessary. The *Veritas* was, at the material time (as the Court found), exhibiting the anchor lights required by art. 6 of the Mersey Rules, 1900, namely, two white lights, one of which was on

(1) Mersey Rules made under an Order in Council, September 17, 1900, art. 4 (*a*): "A steam vessel when towing another vessel . . . . or when attached for the purpose of towing or manœuvring such vessel . . . . shall carry the compulsory lights prescribed by art. 3 of the" Regulations for Preventing Collisions at Sea, 1897, namely, two bright white lights and side lights.

(2) 57 & 58 Vict. c. 60, s. 419, sub-s. 4: "Where in a case of collision it is proved to the Court before whom the case is tried, that any of the collision regulations have been infringed, the ship by which the regulation has been infringed shall be deemed to be in fault, unless it is shewn to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary."

the foretopmast stay, the other on the flagstaff aft. The tug *Prairie Cock* was exhibiting a steam vessel's under-way lights, namely, a masthead light and side lights. In these circumstances the *Veritas* was run into by the defendants' steam vessel *Devonian*, of 10,500 tons gross register, and a crew of ninety-eight hands and a pilot, from Boston to Liverpool with a general cargo, passengers and cattle. The *Prairie Cock* cast off at the moment of collision, but, as the *Veritas* commenced to fill, she and the other tug previously engaged to dock her, towed the *Veritas* ashore. She, however, subsequently slipped off, and, sheering out into the river, capsized.

At the hearing on January 31, February 4, 5, 6, and 7, 1901, before Sir F. H. Jeune P., assisted by two of the Elder Brethren of the Trinity House, the Court found that the tug *Prairie Cock* was "attached for the purpose of towing or manœuvring" the *Veritas* within the meaning of art. 4 (*a*) of the Mersey Rules, and should have exhibited the towing lights required by that rule. The Court, therefore, whilst finding the *Devonian* to blame for bad look-out, by reason of which those in charge of that vessel improperly neglected to keep clear of the *Veritas*, also held the *Veritas* to blame under s. 419, sub-s. 4, of the Merchant Shipping Act, 1894, in that those in charge of her, although in a position to exercise control over the *Prairie Cock*, improperly neglected to prevent that tug infringing the regulations by exhibiting misleading lights, namely, under-way lights, which, though they did not in fact, might by possibility have contributed to the collision.

As to the effect in law of the exhibition by the tug of misleading lights whilst attached to the *Veritas*, the learned judge said:—

"Now comes the further question, which is mostly a question of law (or perhaps there are two questions of law), which is by no means so simple. The lights exhibited by the tug *Prairie Cock* on this occasion were the lights of a vessel under way, the masthead and side lights, and the position of things was this. She was attached to the starboard side of the *Veritas* fore and aft by a 7-inch hawser. It is said, and quite truly no doubt, that, at the time, she was not towing the *Veritas* she was

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engaged rather to stand by her and be ready, and was paid a comparatively small sum for the purpose, than to actually assist her at the moment. The *Veritas* was riding to a single anchor.

"There may have been, and there probably was, some reason for doubting whether she was holding the ground sufficiently. Under those circumstances the captain of the *Veritas* was anxious to engage the services of the tug in case anything went wrong with the anchor and the vessel required holding up, or perhaps to ease the strain on the anchor. I do not lay more stress upon the 7-inch hawser than this, because I daresay it was the rope which was most convenient to use, and it was used for the purpose, but it was not like a mere bow rope, but was a rope sufficiently strong to serve as a towing hawser if necessary, and under those circumstances the tug was lashed alongside the *Veritas*. Now, was she within art. 4 (*a*) of the Mersey Rules, which, I think, has the statutory authority of one of the general regulations? . . . . Was this vessel, the *Prairie Cock*, attached to the *Veritas* for the purpose of towing or manœuvring her? That is the first question on this part of the case which I have to decide.

"I have taken the opinion of the Elder Brethren upon it, and they think she was attached for the purpose of towing or manœuvring.

"I entirely agree with that view. She certainly was attached. I do not say, and it cannot be suggested, that at the time she was actually towing. There was no strain on the hawser, but she was there—what for? It is admitted for the purpose of rendering assistance if necessary. What assistance? Why, assistance in towing, in holding the *Veritas* up to her anchor and against the tide supposing the vessel dragged; and therefore she was there, it appears to me, clearly in terms, not actually towing, not attached for towing, but attached for the purpose of towing if and when it was desired by the tow that she should do so.

"Therefore I cannot bring myself to think that this article does not apply. I think it does, and therefore I think that the *Prairie Cock* ought to have exhibited her two towing lights.

Now, there is a further question about which there has been a good deal of interesting discussion, as to whether this omission on the part of the tug might not possibly have contributed to the collision. That is a matter to which I have given a good deal of consideration, because it is always a question of some difficulty.

"We have to start with the hypothesis that the *Veritas* was in fact exhibiting her proper lights, and therefore the question is, supposing the *Veritas* to be exhibiting her proper lights, but those not to have been seen by the persons on board the *Devonian*, can it be said, or ought it to be said, that the absence of, or failure to exhibit, the two towing lights on the tug could have contributed to the collision in question?

"Now, for myself, I confess I do not think it can. I mean that the *Veritas* had sufficient indication, in my opinion, to have protected her from collision with another vessel. She was exhibiting the lights necessary for her to exhibit, and they ought to have been, and would have been, I think, if there had been a proper look-out on board the *Devonian*, sufficient protection to her from the *Devonian* coming into collision with her.

"Therefore I assume it may be said that no additional light was necessary, and I think it is sound to say that if sufficient lights are exhibited, it is immaterial whether more lights are exhibited than would have been sufficient.

"If authority is to be given for that, I should refer to the case of *The Breadalbane* (1) . . . . upheld by a recent decision of the Court of Appeal in the case of *The Argo* (2), an appeal from myself. . . . . where the conclusion I came to was that not seeing a light which was visible and ought to have been seen and was not seen by the on-coming vessel shewed such a clear absence of look-out on the part of those responsible that, even if the proper lights had been exhibited, in all human probability they would have been no more seen than the light, the failure to see which brought about the collision.

"So far as the direct operation of the lights of the tug were

(1) (1882) 7 P. D. 186. (2) (1900) 9 Asp. M. L. C. 74.

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concerned, I think it may well be said that if the *Devonian* failed to see the anchor light of the *Veritas* it might be that an additional towing light of the *Prairie Cock* would not have afforded more than an extra and superfluous opportunity to the *Devonian*.

"But that does not exhaust the case, and a consideration has impressed itself upon the minds of the Trinity Masters and myself which to my mind is very material. The tug not only did not exhibit the right lights, but exhibited wrong lights. The lights exhibited by the *Prairie Cock* were those of a vessel under way, and no doubt they impressed, and would impress, upon the minds of those on board the *Devonian* that she was a vessel unattached, under way, coming down the river in the ordinary way . . . . by herself.

"If the towing lights had been exhibited, would the *Devonian* probably, or might she, have seen them? I think she would. It is not a case like that of *The Argo* (1) or *The Breadalbane* (2), where the look-out was so completely deficient that practically nothing was seen, because there, probably, if another light had been exhibited, it would not have been seen any more than those that were exhibited were not seen; but it is clear that the *Devonian* did see the green, red, and masthead lights on board the tug; and it is of course quite possible—indeed, my own view is that it was the case, because she did see the lights of the tug and concentrated her attention upon them, that she failed to see the neighbouring, and perhaps dimmer—I daresay they were dimmer—lights of the *Veritas*.

"It is the usual operation of the human mind, when you have your attention very strongly directed to one object, to notice that, in exclusion to anything else, and, seeing this one set of lights, they were the only ones that those on board the *Devonian* were able to regulate their conduct by. But, if the two towing lights had been exhibited, I think, in the first place, they would probably have been seen. I think the *Devonian* would have seen two towing lights on the *Prairie Cock*, as she did see the masthead light of that vessel.

"If they had been seen, might they not possibly—because

(1) 9 Asp. M. L. C. 74. (2) 7 P. D. 186

one need not go further than that—have induced those on board the *Devonian* to be more alert than they were to discover the neighbouring lights of the *Veritas*? I think they might.

"I do not say it would have been so, but I cannot help thinking that it is quite within the range of possibility that the *Devonian's* people, had they seen the two towing lights, would have said to themselves, 'This is a vessel towing another, and, therefore, that other must necessarily be in close proximity.' It is to be remarked that there was another vessel, the *Hildebrand*, exhibiting her anchor lights not very far off, and it may be that it was her lights also which to some extent prevented the lights of the *Veritas* attracting the attention which they otherwise would have attracted. But if those on board the *Devonian* had seen two towing lights on the tug, I think the natural condition of their minds would have been to be very alert to look out to see where was the tow which presumbly the tug had in charge at that time. They would then have looked carefully between the lights of the *Hildebrand* and the lights of the tug; they would have scanned with glasses the whole of the space between them which might be occupied by the lights of a vessel in tow, and I cannot help thinking that it is not only possible, but even probable, that they would have succeeded in making out the lights of the *Veritas* and been in a position to avoid the collision, which they unfortunately were not.

"Therefore I think the proposition is made out, going by steps, that the tug *Prairie Cock* ought to have exhibited those towing lights, and that some one is responsible under the Merchant Shipping Act and the regulations as a cause of the collision, by reason of those lights not being exhibited.

"Under those circumstances . . . . is the *Veritas* responsible for her tug exhibiting improper lights?

"I do not think that it can possibly be put on any broad common law doctrine. It cannot, I think, be said in a simple way that the relation between the two was the relation of master and servant, and, therefore, whatever the tug did wrong the tow was responsible for. In the case of principal

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and agent, or master and servant, where a servant is employed the master is responsible for his wrong acts, by reason of the common law relation between them, but, as has been pointed out in more than one case, especially in the case of *The Quickstep* (1), it is not a relation which one can properly seek to impose in these cases. One cannot say it depends solely upon the common law position, because the tug holds rather the position of independent contractor, or rather the position of a person employed, but independently employed . . . . But the doctrine upon which reliance can be placed is that of the Admiralty, namely, that under some circumstances the tug and tow must be considered to be identified as a composite single body so created, the control being in the tow and not in the tug.

"In the first place it is to be observed that although that is the Admiralty doctrine, still there must be, I was going to say a flavour—I hardly know whether that term is right—of the common law about it, which compels one to say there must be the relation in fact of master and servant.

"Unless it can therefore be shewn that the tow and tug really stood in the relation to one another of employer and employed, neither the Admiralty nor any other doctrine applies to make the tow liable.

"That is illustrated by the case of *The Quickstep* (1), where a good many barges were in tow of a single tug, and it is illustrated further by the way in which, I believe, the American Courts have worked the matter out in cases where in their rivers there are a very large number of barges owned by many owners and under the control of a single tug. In those cases it has been held that the relation of master and servant does not apply at all. In point of fact, there are many masters and one servant, and no one is master more than the other.

"Under those circumstances one might use Admiralty language and say there is no identification of the two, or you may put it upon the failure of the common law relation between master and servant. However it is put, the result is the same, that there is no such relation between them as

(1) (1890) 15 P. D. 196.

would enable you to import a liability on the ground either of common law or Admiralty law.

"That only applies where the question of who is master, or is there any master, can fairly be asked.

"A further principle, which appears to me to be necessary for the due development of the Admiralty doctrine, consists in the identification of the tow and the tug, and I quite agree with the view which has been put forward that, under those circumstances, it is necessary to shew more for the purpose of introducing the Admiralty doctrine than a mere employment.

"For example, if the tug were at a very considerable distance from the tow—I think I put in the course of the argument the case of a tow sending for the tug which is starting on her voyage to reach her, and perhaps being miles away from her, because it is impossible to say that the tow would be liable for misconduct or neglect on the part of the tug in that case.

"Why? Because the circumstances would not arise which would give rise to a reasonable application of the Admiralty doctrine, and in order to make that doctrine apply it is necessary to shew that in fact the circumstances were such that the two were identified and that the control of the tug by the tow was a reasonable and practicable thing.

"If that breaks down, if you can shew that there was no such control, and there could be no such control, then every foundation for the Admiralty doctrine vanishes.

"Now the question is: How is the line to be drawn; when is it to be said that a tug and tow are in such a relation in fact to one another that the tow should be held liable for misfeasance or misconduct on the part of the tug? . . . .

"I think the true principle and the true line is: Were the two in such a position towards one another that the control of the tow over the tug was practicable and possible?

"That appears to me to be the true test, and I apply that to the authorities which have been mentioned, such as *The Niobe* (1) and the other cases, and I should say that in all those cases where liability has been established it has been

(1) (1888) 13 P. D. 55; *McCowan* v. *Baine*, [1891] A. C. 401.

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because the tow was in a position to exercise control, and that control over the tug ought to have been applied. . . .

"It appears to me the tow is responsible for the conduct of the tug, so far at least as she can practically and reasonably exercise the control. That at any time to my mind is the minimum of the obligation, and this case appears to me to fall within that minimum of obligation, to have taken care that the tug exhibited the proper lights.

"The tug was there absolutely connected with her, lying close beside her, and it appears to me impossible to say that the pilot on the *Veritas* might not perfectly well have interfered and told the captain of the tug to put his proper towing lights up. I agree there might have been a difference of opinion between the two upon the subject, but the responsibility on the part of the pilot is to see that she had her proper lights up; and if we once make up our minds what the proper lights were, then it becomes the duty of the *Veritas* to see that those proper lights were put out.

"Therefore I think that the *Veritas* in this case was responsible, under the circumstances, for the *Prairie Cock* not exhibiting her two towing lights; and I have already said that, in my judgment, the absence of those two towing lights, in place of the lights which were in fact exhibited, might have contributed to this collision.

"Under those circumstances, I have to hold the *Devonian* to blame for bad look-out in not seeing the lights of the *Veritas*, and I am compelled also to hold the *Veritas* to blame on account of the improper lights which, in my judgment, the *Prairie Cock* was exhibiting."

On appeal:—

Laing, *K.C.*, and *Stubbs* (*Robson*, *K.C.*, with them), for the appellants (plaintiffs), the owners of the *Veritas*, the owners of her cargo, and her master and crew suing for their lost effects. The finding of the Court below is that the owners of the *Veritas* are to blame because the lights exhibited by the tug *Prairie Cock* were not in accordance with the rules, and might,

by possibility, have contributed to the collision with the *Devonian*; but to bring the case within the principle laid down in 1875 in *The Fanny M. Carvill* (1), it must be shewn that there was a breach of the Mersey rule by the tug which was in the circumstances applicable, and for which the tow is liable. It is however, submitted, first, that there was no breach of the rule by the tug; secondly, that if there was a breach, and if the rules have statutory force so as to bring the wrong-doing vessel within the provisions of sub-s. 4 of s. 419 of the Merchant Shipping Act, 1894, the words of the section do not apply to the *Veritas*, and, thirdly, that the Mersey rule in question has not the statutory authority of one of the general regulations—that is to say, a breach of the rule is only evidence of negligence; so that the finding of the learned judge that the absence of the towing lights did not in fact contribute to the collision is conclusive in favour of the appellants. (2)

As to the first point, according to art. 4 (*a*) of the Mersey Rules, 1900, towing lights are required to be carried by the tug "when towing," or "when attached for the purpose of towing or manœuvring"—that is to say, when the tug is actually engaged in the work of towing, or so attached for the purpose of towing, as to be able to tow or manœuvre; but the evidence is that the tug was not towing, nor was she in a position to tow, for the 7-inch rope forward would not have been strong enough to have enabled the tug to have actually towed or manœuvred the *Veritas*, and, even if strong enough, neither the forward nor the after rope (if any) were in such a position as to have enabled the tug to put any effective strain upon them. According to the pilot of the *Veritas*, the tug was made fast "with a small rope forward and a small one aft," and she is rather to be regarded as hitched on to a bollard on board the *Veritas* to prevent herself drifting away, or, as the master of the tug expressed it, "just to hold us alongside" whilst standing by, and the master of the tug was, at the material time, on board the *Veritas*. It follows, therefore, that there was no duty on the tug to exhibit towing lights.

(1) (1888) 13 App. Cas. 455, n.

(2) This third point was abandoned during the argument.

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Secondly, a breach of the rule by the *Prairie Cock* will not bring the *Veritas* within the provisions of s. 419, for the words of sub-s. 4 are, "the ship by which the regulation has been infringed shall be deemed to be in fault"; but the "ship" must mean the tug, not the tow—that is to say, the owners of the ship *Veritas* cannot be deemed to be the owners of the ship *Prairie Cock*, nor can the master of the *Veritas* be deemed to be the master of the *Prairie Cock* for the purpose of rendering the owners and the master of the *Veritas* liable under the highly penal clauses contained in the sub-divisions of the section in question. No doubt, for some purposes, such as the necessity of a single command, a tug and her tow are, by intendment of law, treated as one vessel; but that is only where the tug and the tow are in such relative positions that they are actually performing their respective functions in the course of the joint navigation of both, and the tug is supplying the motive whilst the tow is supplying the governing power, and the circumstances may negative the assumption: *The Quickstep* (1), as where the tow is not liable by reason of the tug supplying the governing as well as the motive power: *The American and the Syria* (2); or where there is no want of reasonable care on the part of the tow in giving proper directions during the towage: *The Stormcock* (3); and, assuming that under Admiralty law the direction lies with the tow, that will not create the relationship between the tow and the tug of master and servant, but will leave the tug in the position of an independent contractor. In such circumstances, liability under sub-s. 4 cannot be made to depend on nice questions as to the actual control at the time. In the case of *The Mary Hounsell* (4), decided on the corresponding section of the Act of 1873 (36 & 37 Vict. c. 85, s. 17), it was held that the towing vessel was responsible for a wrong light carried by the towed vessel; but in that case the question was not raised as to the non-liability of the tow for what may be called a part of the internal economy of the tug, namely, her lights; and the circumstances of that case were peculiar, for the pilot cutter, which was

(1) 15 P. D. 196.
(2) (1874) L. R. 6 P. C. 127.
(3) (1885) 5 Asp. M. L. C. 470.
(4) (1879) 4 P. D. 204.

exhibiting the misleading light, was being actually towed at sea astern of the sailing vessel which was held to blame; but, under ordinary circumstances, where a tug is towing with a long scope of hawser, the towed vessel cannot see what lights the tug is exhibiting. In the present case the tug was not "towing" the *Veritas*, nor, at the material time, "attached" for that purpose, as she was only hanging alongside with her stem abreast of the bridge of the *Veritas* waiting in case she should be required; so that the time had not arrived when the relationship of tug and tow would exist, and no duty was as yet cast upon the *Veritas* to give directions as to lights or otherwise. The mere fact that the *Veritas* had engaged the tug will not suffice to involve the *Veritas* in liability; the circumstances must be such that those in charge of the tow are, at the material time, in command of those in charge of the tug. It is further contended that as the tug was "not at anchor, or made fast to the shore or aground," she was "under way" within the meaning of the preliminary article of the Regulations for Preventing Collisions at Sea, 1897, and was, therefore, exhibiting the proper lights required by art. 2 of those regulations for a steam vessel under way, namely, a masthead light and side lights.

Joseph Walton, K.C., Aspinall, K.C., and *Glynn*, for the respondents (defendants), the owners of the *Devonian* and freight. It is submitted that the tug *Prairie Cock* was, at the material time, "attached for the purpose of towing or manœuvring" the *Veritas* within the meaning of art. 4 (*a*) of the Mersey Rules, for, the engines of the *Veritas* having broken down, that vessel had no motive power, and, whilst at anchor waiting for water to go into dock, her master, who was anxious as to the danger of dragging, specially engaged the *Prairie Cock*, in the words of the log, "to make fast alongside, to manœuvre and keep us to our anchor." The engines of the tug had, therefore, for the time being become the engines of the *Veritas*, and the 7-inch hawser with which the tug was made fast was sufficient to tow a vessel of only 485 tons gross register. Under these circumstances the tug was bound to carry the towing lights prescribed by art. 3 of the general

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regulations, and for a breach of the regulations which might by possibility have contributed to the collision with the *Devonian*, the owners of the *Veritas* are liable.

The principle that, in the ordinary contract of towage, the control of the tug is in the tow, and that the two are identified for the purpose of their joint navigation, is laid down by the Privy Council in *The American and The Syria* (1), and by Sir James Hannen in *The Niobe* (2), though in the first case the Privy Council held that in the special circumstances of the governing and the motive power being wholly in one vessel the principle did not apply; and in the second case the learned judge refers in his judgment to, and excepts such a case as, *The Stormcock* (3), where the tow is unable to anticipate and guard against the sudden action of the tug. When the case of *The Niobe* (*McCowan* v. *Baine*) (4) came into the House of Lords on the construction of a policy of insurance, the learned Lords held that a collision with the tug was a collision with the tow, and, therefore, the insured ship was liable in respect of a collision between her tug and another vessel: see this case, referred to by Sir F. H. Jeune P. in *The Englishman and The Australia.* (5)

The difficulty suggested by the appellants, that the word "ship" in s. 419, sub-s. 4, of the Merchant Shipping Act, 1894, must mean the *Prairie Cock* and not the *Veritas*, is removed by the consideration that the word "ship" means those responsible for the ship—that is, the owners of the ship whose servants should have exercised the control for the purposes of navigation over both ships identified as one ship. In this case those servants were the master, pilot, and crew of the *Veritas*, whose duty it was to require that those in charge of the tug should exhibit proper lights.

[Counsel for the respondents were not called upon to argue the question of the absence of the lights by possibility contributing to the collision.]

Laing, K.C., in reply.

(1) L. R. 6 P. C. 127, at p. 132.
(2) 13 P. D. 55, at p. 59.
(3) 5 Asp. M. L. C. 470.
(4) [1891] A. C. 401.
(5) [1894] P. 239, at p. 245.

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[The following cases were referred to: *The Khedive* (1); *The Morgengry and The Blackcock* (2); *Jones* v. *Corporation of Liverpool* (3); and Marsden's Collisions at Sea, 4th ed. (1897), p. 203.]

LORD ALVERSTONE C.J. It is desirable to understand clearly the facts before dealing with the law applicable to this case, because, I think, very different considerations might arise if the tug *Prairie Cock* had been merely hanging on to the vessel at anchor—hitched on, as counsel for the appellants cleverly put it when opening the case—for the purpose of preventing herself drifting away, and not at the time engaged, or not at the time in a condition to render any service to the ship; but, assuming that the ship's log gives a fair statement of the manœuvres which were being carried out, the entry, as translated, reads as follows, that "at about seven o'clock a tug came, and was engaged to make fast alongside, to manœuvre and keep us to our anchor until we could enter the dock." That account is read to the master of the *Veritas* in cross-examination, and he is asked, "Is that right?" He answers, "Yes, he was engaged to stop alongside to manœuvre or swing round or keep us to our anchor if we should go adrift or anything should happen." On these facts the President came to the conclusion—and I do not think there is any evidence to shew that he was wrong—that the tug was fast fore and aft, and that she was in a position to put a strain on the rope at any time she might see fit to do so. I do not think we could come to any other conclusion, because it was only a 7-inch rope. The learned judge has come to the conclusion that the tug was there to assist, and to manœuvre, if necessary, the vessel to which she was fast, and we concur with him in this view.

In these circumstances I am clearly of opinion that the tug comes within the words of art. 4 (*a*) of the Mersey Rules, under which a steam vessel when towing another vessel or attached for the purpose of towing shall carry the prescribed lights, and

(1) (1880) 5 App. Cas. 876. (2) [1900] P. 1.
(3) (1885) 14 Q. B. D. 890.

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I come to the conclusion that the tug was in such a position and doing such work in the Mersey as made it imperative for her within the rule to have two white lights at her masthead. We have not thought it necessary to call upon counsel for the respondents to argue the question whether the absence of the second white light at the masthead might have contributed to the collision, because since *The Fanny M. Carvill* (1) was approved by the unanimous judgment of the House of Lords in *The Duke of Buccleuch* (2) it has been considered settled that the true construction of s. 17 of the Merchant Shipping Act, 1873 (now s. 419, sub-s. 4, of the Merchant Shipping Act, 1894), is that "the infringement must be one having some possible connection with the collision; or, in other words, the presumption of culpability may be met by proof that the infringement could not by any possibility have contributed to the collision," and it has not been argued before us that rule 4 (*a*) of the Mersey Rules has not the force of a statutory rule. For the reasons very clearly stated by the learned judge, I think he was right in coming to the conclusion, not only that there was a possibility, but more than a possibility, that the absence of a second white light might have contributed to the collision.

The next point is not free from difficulty—namely, whether the *Veritas* is responsible for the absence of the second white light, and whether she is responsible in such a way as to bring her within s. 419 of the Merchant Shipping Act, 1894. With regard to her responsibility, apart from the statute, I do not think there is any doubt about the law, though there was difficulty about its application until the case of *The Cleadon* (3), when it was recognised that where one ship is in tow of another the two ships are by intendment of law for some purposes to be regarded as one, the commanding or governing power being with the tow, and the motive power with the tug. When that case came to be considered in *The Niobe* (4), Lord Selborne used these words: "Where a ship in tow has control over, and is answerable for, the navigation of the tug, the two vessels—each physically attached to the other for a common operation,

(1) 13 App. Cas. 455, n.
(2) [1891] A. C. 310.
(3) (1860) 14 Moo. P. C. 92.
(4) *McCowan* v. *Baine*, [1891] A. C. 401.

that of the voyage of the ship in tow, for which the tug supplies the motive power—have been said by high authority, to be for many purposes properly regarded as one vessel." No doubt there have been cases in which that rule has not been applied, or it has not been necessary to apply it. For instance, in *The Stormcock* (1), where an action was brought against a tug, the tug was held responsible for its own negligence in respect of its own manœuvring; but, speaking for myself, I think that if two vessels are so attached, and are under such management and control that they move practically as one vessel, the tow is responsible for the action of the tug. Whether or not the tug is also responsible, we need not consider. Therefore, if it was a case of collision actually brought about by absence of lights, that would dispose of the case, because I think, attached as the tug was, waiting for the orders of the master or pilot of the tow to put on her engines for the purpose of manœuvring, the two vessels were so attached and were under such control as to be regarded as one vessel.

It still remains to consider the point—as to which I have had considerable doubt—which turns on the wording of sub-s. 4 of s. 419: "Where in a case of collision it is proved to the Court before whom the case is tried, that any of the collision regulations have been infringed, the ship by which the regulation has been infringed shall be deemed to be in fault, unless it is shewn to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary." Counsel for the appellants contend that the word "ship" in that clause refers to the physical object, that is, the ship on which or by which the rule has been infringed; but I think that would be too narrow a construction, for it must be borne in mind that when this section was passed, the law as to tug and tow being regarded as one ship was perfectly well known, and ex hypothesi the authority which could direct proper lights to be exhibited would be the tow, as well as the master of the tug if he regarded it as his own duty.

In these circumstances I think it is right to say that the ship by which the rule has been infringed in this case was the

(1) 5 Asp. M. L. C. 470.

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ship on which those in charge had authority to see that proper lights were exhibited on the tug, and, having neglected to see that that was done, the ship has infringed the regulation. I do not deny that it is possible to come to another conclusion, and I do not put it as a matter that is absolutely clear; but, after full consideration, I think it is not straining the section to say that the regulation has been infringed by the ship, the master of which had imposed on him the duty of controlling and governing the tug, and I think it would be wrong to hold that, because the particular place where the light was not exhibited happened to be on board the tug which was alongside the ship, therefore the regulation was not infringed by the ship. If it was infringed by the ship, that is to say, the tow, as I think it was, then it follows that the judgment in the Court below was right.

A. L. SMITH M.R. and ROMER L.J. concurred.

Appeal dismissed.

Solicitors for appellants (plaintiffs): *Thomas Cooper & Co.*

Solicitors for respondents (defendants): *Rowcliffes, Rawle & Co., for Hill, Dickinson & Co., Liverpool.*

T. L. M.

In the Matter of CHARLES JOSEPH PANTON, an unauthorized Person.

1901
May 20.

Probate—Practice—Attachment—Solicitors' Act, 1860 (23 & 24 *Vict. c.* 127), s. 26—*Unauthorized Person—Lodging Caveat—Ministerial Act.*

Lodging a caveat is a ministerial act; and a person, not being a solicitor, who performs this act on behalf of another, is not liable to attachment under s. 26 of the Solicitors Act, 1860.

Motion on behalf of the Incorporated Law Society for an attachment against Charles Joseph Panton for acting, as was alleged, as a solicitor, he being, in fact, a law stationer, and, as such, an unqualified person within s. 26 of 23 & 24 Vict. c. 127.

It appeared that, pursuant to written instructions received by Mr. Panton's firm from a firm of country solicitors, Mr. Panton attended at the Principal Probate Registry on November 24, 1900, with the object of lodging a form of caveat which had been signed by the country solicitors; and he entered in the caveat book the name and address of the said solicitors, but was told by the clerk in attendance that a London address must be given. Mr. Panton objected that he could not give his own address, stating as his reason that he was a law stationer and not a solicitor; whereupon the matter was referred to a superior official, who, in the presence of Mr. Panton and in that of the first-mentioned clerk, stated that it was "open to any one to enter a caveat."

As the solicitors in the country had written that the matter was urgent, and as it was then between 12 and 1 o'clock on a Saturday, Mr. Panton, though with considerable hesitation, filled in his own name and address in place of the name and address of the country solicitors.

The same day Mr. Panton reported the circumstances to the said solicitors, who continued to correspond with him without raising any objection to what had been done, and who

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PANTON, *In re.*

eventually instructed Mr. Panton to subduct the caveat, which he accordingly did on November 29, 1900.

Hollams, for the Incorporated Law Society, said that, having seen the explanation of Mr. Panton since the notice of motion was filed, he did not now press for a writ of attachment, but he asked for costs.

Powles, for Mr. Panton, submitted that no order for costs should be made, no opportunity having been afforded his client to give an explanation, which was admittedly a sufficient and explicit one. The mistake arose from the wrong information given to Mr. Panton by the official in the Probate Registry.

THE PRESIDENT (SIR F. H. JEUNE) said that there had been a mistake, which had arisen from an opinion expressed by an official in the registry, who had thought it necessary that a person entering a caveat should give a London address. That was not so, however. All that Mr. Panton really did in this case, in going to the registry to lodge the caveat, was to act as the messenger of the country solicitors. He was led into inserting his own name and address owing to the above opinion of one of the Probate officials, and this had unfortunately given a false colour to the transaction. According to the leading decision of *The Law Society of the United Kingdom* v. *Waterlow Brothers & Layton* (1), it was clearly necessary to look carefully to see whether a person whose conduct was thought to be open to question had acted as a solicitor or had merely performed some ministerial act. It was quite right that the Law Society should be extremely vigilant; but, having regard to the fact that some eight years ago they had obtained a very clear exposition of the law in the House of Lords in the case above referred to, they ought, in the present case, to have been very careful to ascertain that there had been a real infringement of their rights and privileges before adopting the drastic course of moving for an attachment. He did not wish it to be assumed that the society had acted without consideration, so he would not order them to pay costs.

(1) (1883) 8 App. Cas. 407.

On the other hand, he did not desire to inflict any kind of penalty upon Mr. Panton. The motion would be dismissed, and there would be no order as to costs.

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PANTON, *In re.*

Solicitor for Incorporated Law Society: *E. W. Williamson.*
Solicitors for Mr. Panton: *Morice & Blakesley.*

H. D. G.

NOTT *v.* NOTT.

1901

May 18.

Divorce — Practice — Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39)*—Income of Husband and Wife—Computation—Voluntary Allowance.*

In estimating the respective incomes of a husband and wife upon a matter arising under the Summary Jurisdiction Act, 1895, a voluntary allowance is to be taken into account.

HUSBAND'S appeal from a court of summary jurisdiction sitting at Green Lane, Liverpool, in the county of Lancaster, on February 5, 1901, under the Summary Jurisdiction (Married Women) Act, 1895, whereby the magistrates constituting the said Court refused an application by the husband to reduce the amount of 1*l.* per week which was ordered to be paid to the wife under an order of May 29, 1900.

It appeared that the parties were married in 1890; that there were five children of the marriage, the wife having the custody of them; that the husband was in receipt of a salary of 30*s.* a week, with a right to commission conditional on a certain turnover, which had not been reached; and that he had to pay certain travelling expenses out of his salary. It was further stated by counsel that the husband had already served one term of imprisonment, and that there was another summons pending in respect of arrears of maintenance.

The evidence as to the wife's means was to the effect that she had to keep herself, her father, who had no income, and her five children; that three of the children went to school, but she did not pay for their schooling; that she received 26*l.* a year as allowance for rent, and 25*s.* a week as a voluntary

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allowance from her aunt; and that she was obliged to keep a servant, being unable to do the work herself.

Barnard, for the appellant, submitted that the voluntary allowance to the wife should be taken into account, and referred to *Clinton* v. *Clinton* (1), cited in Brown and Powles on Divorce, p. 271. [He also cited *Bonsor* v. *Bonsor*. (2)]

The respondent (wife) was not represented on the appeal.

THE PRESIDENT (SIR F. H. JEUNE). We can deal with this matter at once. I think it is important to do so, as far as possible, in these cases, rather than to send them back to the justices. Our duty is, as the duty of the justices was, to decide the case having regard to the facts existing at the particular moment. If the circumstances alter, either party can apply to review the order now made. The facts are roughly that the husband earns about 30*s*. a week, and the wife gets practically the same amount, because, although it is said to be larger, she is fixed in a house of a certain rental instead of being able to get into a cheaper one. The wife would not, therefore, for herself, be entitled to any allowance; but one has to consider the children, according to the principles usually applied in this Court. In arriving at the amount of the wife's income I have included the voluntary allowance which she receives. That is the proper course. I had to consider the authorities on the point in deciding the case of *Bonsor* v. *Bonsor*. (2) It seems to be only common sense that when you are dealing with actual income, you must take into account the total actual income, without considering from what source it is derived. The justices ought, therefore, in arriving at the amount of the wife's income, to have taken into account the voluntary allowance which the wife was receiving. In considering the husband's income, where he is, in fact, earning a certain salary, it would be entering into a matter of speculation which I should be slow to enter into to say that he might earn more. It is quite a different matter where a man who is capable of working is, in fact, earning nothing at all. In such a case his potential

(1) (1866) L. R. 1 P. & M. 215.

(2) [1897] P. 77.

earning power may properly be taken into account, and we have so held. (1) Having regard to the reasons given by the justices in refusing to reduce the allowance of 1*l.* a week previously ordered, and taking into account the actual facts of this case, I have no hesitation in saying that the amount allowed by the justices is excessive, and that the proper amount should be 10*s.* a week. The order of the justices ought, therefore, to be varied to that extent.

GORELL BARNES J. I agree.

Appeal allowed.

Solicitor: *John Hands, for John Sefton, Liverpool.*

H. D. G.

[IN THE COURT OF APPEAL.]

C. A.

1901

May 22.

THE CARGO EX PORT VICTOR.

Admiralty—Salvage—Action in Personam—Government Stores—Negligence—Liability of Charterers of Salved Vessel.

Government stores were shipped on a chartered vessel under bills of lading signed by the master by direction of the charterers, not exempting the shipowner from liability for negligence, and subject to the stipulations of a freight engagement entered into with the charterers by a Government department under which the owners (the term including the charterers) were responsible for the safe delivery of the stores. The vessel, through the negligence of her master and crew, came into collision with another vessel, and was so much damaged as to require salvage assistance in putting back to the port of shipment, where the stores were returned to the Government department. In an action of salvage in personam by the salvors against the charterers:—

Held, by the Court of Appeal (Lord Alverstone C.J., A. L. Smith M.R., and Romer L.J.), affirming the decision of Sir F. H. Jeune P., that, as the charterers were directly interested in the preservation of the goods, the salvage service was a benefit to them, and, therefore, on the authority of *Five Steel Barges*, (1890) 15 P. D. 142, and *Duncan* v. *Dundee Shipping Co.*, (1878) 5 R. 742, the action would lie.

APPEAL by defendants, the Jamaica Fruit Importing and Trading Company of London, Limited, against an award of Sir F. H. Jeune P. in an action of salvage.

(1) *Earnshaw* v. *Earnshaw*, [1896] P. 160.

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The case is reported on the question of the liability in personam of the charterers of a vessel for the salvage of Government stores in the preservation of which they were interested.

The material facts were shortly as follows:—

On June 4, 1897, the screw steamship *Port Victor*—of 2793 tons gross register and a crew of forty-six hands, from London to Jamaica viâ Plymouth, with four passengers and a general cargo, including Government War Office stores of the value of 3000*l.*—came (through the negligence of her master and crew) into collision with the steamship *Roecliff* in the English Channel between Dungeness and the Royal Sovereign Lightship. The *Port Victor* sustained considerable damage, and on June 6, by the efforts of the Antwerp steamship *Amelie*, the steam-tugs *Columbia* and *Shamrock*, and the steamship *Lady Vita*, she was brought in safety to the Tilbury Docks.

Three salvage actions in rem were commenced against the *Port Victor*, her cargo and freight, one by the owners, master, and crew of the foreign steamship, one by the owners, masters, and crews of the steam-tugs, and one by the owners, master, and crew of the *Lady Vita*. Unconditional appearances were entered to the writs, but subsequently these were withdrawn and limited appearances entered, so as to exclude the owners of the Government stores. The three actions were consolidated, and on July 19, 1897, on a total value of ship, cargo, and freight of 18,134*l.*, an award of 2200*l.* was made by Gorell Barnes J. in favour of the plaintiffs, namely, to the *Amelie* 800*l.*, to the *Columbia* 600*l.*, to the *Shamrock* 400*l.*, and to the *Lady Vita* 400*l.*, and the decree condemned the owners of the *Port Victor* and the owners of her cargo (other than that which was the property of the Crown), and also the bail, in the proportions due from them in respect of the sum of 2200*l.* and in costs. Of the total sum awarded, the proportion in respect of the Government stores was 297*l.* 15*s.* 8*d.*, but the question of liability for the payment of this portion of the award was reserved.

The *Port Victor* was, at the time the services were rendered, under a time charter at 900*l.* per calendar month, made in London between the owners of the vessel and the defendants and dated October 9, 1896, for thirty-six calendar months,

under which the master and crew remained the servants of the owners and in possession of the ship on their behalf. By clause 10, "The captain shall sign bills of lading at any rate of freight the charterers or their agents may choose, without prejudice to the stipulations of this charterparty, and the charterers hereby agree to indemnify the owners from any consequences that may arise from the captain following the charterers' instructions and signing bills of lading . . . . and the charterers hereby indemnify the owners against any claim arising under any bill of lading." By clause 22 negligence of the master and crew was mutually excepted. (1)

The engagement for the conveyance of four tons of cartridges, together with gun-cotton, shells, clothing, provisions, and other War Office and Admiralty stores from London to Jamaica, at rates of freight varying from 25*s.* to 77*s.*, was made by the shipping agents for the Transport Department of the Admiralty and the brokers of the defendants. The bills of lading signed by or on behalf of the master were "subject to the stipulations contained in the charterparty or other agreement entered into with or on behalf of the Lords Commissioners of the Admiralty and in the regulations for Her Majesty's transport service." By these regulations the term "owners" is "to be understood as signifying the party or parties who engage to convey the stores under the agreement for freight or charterparty"; and by clause 17, "The owners will be held responsible for the safe delivery of the Government stores shipped, the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of what nature and kind soever during the voyage, always excepted; and provided always that the liability of the owners arising from negligent navigation shall be limited as provided by the Merchant Shipping Act, 1894, and shall in no case exceed 20*l.* per freight ton."

The plaintiff salvors applied to the Transport Department

(1) This charterparty is more fully set out on a question of general average contribution between the owners of the *Port Victor* and the present defendants in *Milburn & Co.* v. *Jamaica Fruit Importing and Trading Company of London*, [1900] 2 Q. B. 540, at p. 541.

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THE CARGO EX PORT VICTOR.

of the Admiralty for payment of the sum awarded, but were refused on the ground that the bills of lading did not contain any negligence clause exonerating the carrier, so that the stores were at the risk of the defendants. The plaintiffs (other than the owners, master, and crew of the *Lady Vita*) thereupon issued, on January 7, 1901, a writ in personam against the defendants. The claim was resisted on the ground that the defendants were the charterers, not the owners of, or in possession of, the *Port Victor*, and that they were not the owners of, or in possession of, the stores, which were the property of the Crown.

On March 23 SIR F. H. JEUNE P. gave judgment in favour of the plaintiffs for the amount claimed, with costs, on the ground that, as between the Government and the defendants, the defendants were responsible for safe delivery, and, therefore, on the the authority of *Five Steel Barges* (1) and *Duncan* v. *Dundee Shipping Co.* (2), the action would lie, as the defendants were directly interested in the preservation of the goods, and the salvage service was a benefit to them.

In the course of a considered judgment the learned judge said:—

It was argued before me that the facts of this case bring it within the principle of the *Five Steel Barges* (1), decided, by Lord Hannen. In that case the defendants were under a contract to build and deliver certain barges to the Government. The barges were being towed by the plaintiffs for the defendants from Chepstow to Portland, and were salved by the plaintiffs, who brought an action in personam against the defendants in respect of two of the barges which were given up to the Government. It was argued for the plaintiffs that the defendants had an interest in the barges being delivered safely to the Government, and that, therefore, a service was rendered to them personally. It was said, in answer, that the plaintiffs had lost any rights they possessed against the barges by giving them up to the Government, and that the defendants had no property in them. Lord Hannen held that it was clear on the authorities that an action in personam lies against the owners of

(1) 15 P. D. 142. (2) 5 R. 742.

a vessel which has been saved, even though the property has been transferred to others, and the lien lost. In this case," the learned judge proceeded, " the property does not appear to have been in the defendants, because it would, I think, under the contract, be in the Government; but I am of opinion that the right to sue in personam is not confined to the case of the defendants being the actual legal owners of the property salved. I think it exists in cases where the defendant has an interest in the property saved, which interest has been saved by the fact that the property is brought into a position of security. The jurisdiction which this Court exercises in salvage cases is of a peculiarly equitable character. The right to salvage may arise out of an actual contract, but it does not necessarily do so. It is a legal liability arising out of the fact that property has been saved, that the owner of the property who has had the benefit of it shall make remuneration to those who have conferred the benefit upon him, notwithstanding that he has not entered into any contract on the subject. I think that proposition equally applies to the man who has had a benefit arising out of the saving of the property. In this case the defendants were under contract with the Government to supply them with barges at a certain price. Payment was to be made by certain instalments, of which only one remained unpaid at the time of the services. I think that, if Mr. Barnes's argument is well founded—namely, that those instalments were all paid on condition that the barges should be delivered all within twelve months of the date of the contract—it would follow that, if the defendants had not been in a position to deliver the barges within the twelve months, then either they would have been liable in damages for not performing the contract, or liable to make restitution of the instalments which had been paid them on conditions not fulfilled by them. It appears to me, therefore, that they had substantially an interest to the full amount of the barges, at the time of the services, and that the same moral obligation to which the law has given force in the case of an owner applies to those who have an interest in the property."

There is a decision in the Scottish Courts which appears to

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me to be in accordance with that in the *Five Steel Barges*. (1) In *Duncan* v. *Dundee Shipping Co.* (2) it was held by the Court of Session that the shipowners in that case were acting as common carriers, and were, in the circumstances of the case, liable for the safe delivery of the goods, and that, therefore, they had no defence to a claim for salvage in respect of such goods. "The case," Lord Shand said, "comes to this—that, the carrier of these goods being absolutely bound to deliver them at the end of the voyage, the salvage has directly enured to his benefit, for it has enabled him to fulfil his contract and to earn the freight which he charged for these goods. On the ground that it is established in this case as matter of fact that the benefit of this salvage, in so far as regarded the cargo, enured directly to the carrier, I am of opinion that he is liable for the salvage which is here claimed."

It was argued before me that the present case can be distinguished from that of the *Five Steel Barges* (1) on the ground that in that case the defendants had a lien for the price of the barges, and so, for practical purposes, were the owners, although the property in law was no doubt in the Government. It was contended that the claim for salvage is limited to a claim against the owners, or at least against the persons who like carriers, are in possession of the goods at the time of the salvage, but that in the present case the defendants were not the owners of the goods, nor were ever in possession of them. A legal foundation for this view was sought in the argument that the Admiralty action in personam is based on the supposition that the goods were allowed by the salvors to be returned to their former possessor on the terms that he should be liable to pay the salvage reward.

I think that this contention is based on too narrow a view of the right of a salvor, and, in my opinion, the nature and origin of the Admiralty action for salvage do not impose any limits on that right narrower than those indicated by Lord Hannen and Lord Shand in the cases I have mentioned. It is quite true that in the case of *The Elton* (3) I said, relying on

(1) 15 P. D. 142. (2) 5 R. 742.
(3) [1891] P. 265, at p. 269.

the authorities I there cite, that, "although salvage suits, in the form of actions in personam, are comparatively rare, the Court of Admiralty always had jurisdiction, founded apparently on the fiction of an action in rem having been brought and the property salved having been allowed to be taken by the owners, to entertain such suits when at least there existed a corpus of property salved"; but in the following year, when I had occasion in the case of *The Dictator* (1) to examine the subject of the origin and nature of the Admiralty jurisdiction more fully, I came to the conclusion, which the approval expressed by the Court of Appeal in the case of *The Gemma* (2) leads me to hope was well founded, that the action in personam did not arise out of jurisdiction in rem, and that the distinction between actions in personam and actions in rem depended only on whether the person or property of the defendant was arrested in the first instance. To rest the jurisdiction of the Admiralty Court upon an implied request from the owner of the property in danger to the salvors, or on an implied contract between the salvors and owner with the relinquishment of the res for consideration, is, I think, to confuse two different systems of law and to resort to a misleading analogy. The true view is, I think, that the law of Admiralty imposes on the owner of property saved an obligation to pay the person who saves it simply because in the view of that system of law it is just he should; and this conception of justice naturally imposes a proportionate obligation on any person whose interest in the property is real, though falling short of that of ownership.

I see no reason, therefore, why I should not follow the view of Lord Hannen, and of the Scottish Court of Session, that a man who has had a benefit arising out of the saving of the property is liable to a claim for salvage no less than the actual owner of it. It was urged before me that to take this view would expose mortgagees and insurers to salvage actions. I do not think it is necessary in this case to define exhaustively the classes of persons against whom, under various circumstances, claims for salvage might be made. There is no doubt the authority of eminent judges in the courts of common law

(1) [1892] P. 304. (2) [1899] P. 285.

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for saying that contribution cannot be required by an owner from the lender on bottomry, or at respondentia: Park on Marine Insurance, 8th ed. ii. 898, and the judgments of Lord Mansfield and Lord Kenyon there cited. On the other hand, Dr. Lushington in *The Louisa* (1) held that mortgagees come within the term "owners" in the sections of the Merchant Shipping Act of 1854 relating to salvage. It is, however, easy to see that the contingent interest of persons who make advances by way of mortgage, or otherwise, on property, or of insurers, is of a different character from that of persons who have a direct interest in its safe delivery, and may negative, or, at least impose different conditions on, the right of a salvor against some of these persons.

It may be, therefore, that it will become necessary hereafter to consider what is the exact definition of the interest in the property saved which gives rise to a claim for salvage; but, in the present case, I have no doubt that the defendant has such an interest, and my judgment must, therefore, be for the plaintiff.

On appeal:—

May 22. *Carver, K.C., Scrutton, K.C.*, and *Balloch*, for the appellants (defendants), the Jamaica Fruit Importing and Trading Company of London, Limited. The learned judge in the Court below has made an award of salvage against the defendants personally in respect of the Government stores shipped on the *Port Victor*; but it is submitted that the action will not lie, for salvage is a reward for saving things of certain kinds, namely, ship, cargo, &c., at sea, and the reward at the outset in cases admitting of such an apportionment consisted of part of the thing itself, and in any case, whether represented by an equivalent in money or not, was enforced by process in rem—that is, by arrest of the thing. Hence, although the service had been rendered on the high seas, so that the Court had jurisdiction, yet if the goods were landed and the salvors ceased to retain possession of them, the process of the Admiralty

(1) (1863) Br. & L. 59.

Court in rem was not available: *The Two Friends.* (1) Bowen L.J. in *Falcke* v. *Scottish Imperial Insurance Co.* (2) says: "with regard to salvage . . . . the maritime law differs from the common law (and) for the purposes of public policy, and for the advantage of trade imposes . . . . a liability upon the thing saved." Hence there was no remedy at common law by action, but a possessory lien in the salvor was recognised: *Hartfort* v. *Jones.* (3) The Court of Admiralty, however, went further, and where the ship had been given up to the master in order that he might continue the adventure, it was assumed that an action in rem was depending, so that all rights were tacitly reserved, and a proceeding by way of monition, calling upon the owner to shew cause why salvage should not be decreed, was allowed: *The Trelawney* (4); that is to say, an action in personam could be instituted when the salvor, who had a right to retain possession of the res in order to ground a demand for salvage by process in rem, waived that right at the request and for the convenience of the owner, or where the aid of the Court was required to compel production of the res; but the jurisdiction was still founded on the maritime lien, so that no liability of the owner of the res arose at all unless some property had been saved: *The Chieftain* (5); and no decree could be made in Admiralty for the preservation of life alone: *The Zephyrus* (6), as no property could be arrested applicable to the purpose: *The Fusilier* (7); that is, the possibility of a suit in rem was in all cases imported even after life salvage was given by statute, the foundation of Admiralty jurisdiction in the awarding of salvage being the power of enforcing the maritime lien obtained on property saved by salvors: see per Brett L.J. in *The Cargo ex Schiller.* (8) The procedure detailed by Clerke (9) as existing in the seventeenth century, namely, arrest of the person, and failing the person any property of his, was for the purpose of compelling appearance with

(1) (1799) 1 C. Rob. 271, at pp. 282, 283.
(2) (1886) 34 Ch. D. 234, at p. 248.
(3) (1698) 1 Ld. Raym. 393.
(4) (1801) 3 C. Rob. 216, n.
(5) (1846) 4 Notes of Cases, 459.
(6) (1842) 1 Wm. Rob. 329.
(7) (1865) Br. & L. 341, at p. 344.
(8) (1877) 2 P. D. 145.
(9) Praxis Curiæ Admiralitatis.

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a view to bail, and does not conflict with the practice in Admiralty based on process in rem, and the substitution of proceedings by way of monition where the res had been given up to the owner instead of being retained by the salvor until the payment of the award was secured. In other words, the liability of the owner arises because he has the res on which the salvor had a charge. In this sense the statement may be accepted made by Sir James Hannen in his judgment in the *Five Steel Barges* (1), that "an action in personam lies against the owners of a vessel which has been saved, even though the property has been transferred to others and the lien lost," for the owner, or person taking the salved thing, then becomes liable; and from that point of view the case of *Duncan* v. *Dundee Shipping Co.* (2) is intelligible, for the property was delivered by the salvors back to the party held liable, who as a common carrier was thereby able to earn his freight.

The Merchant Shipping Act, 1894, consolidating earlier statutes, follows the same principle, when, for example, in s. 554 it enacts that, where a salvor abandons his lien upon the ship or cargo under an agreement with the master, the agreement binds the ship and cargo and the respective owners—that is to say, there is no personal obligation except so far as a claim against the owner is substituted for a claim over the thing salved.

The law of salvage gives no countenance to the proposition that the plaintiffs are entitled to this award because the defendants were interested in the safety of the goods, for the only persons who can be sued in personam are the owners of the res, or those into whose possession the salvors have delivered it, and who have appropriated it. The defendants had no proprietary interest. They were not in possession at the time of the salvage, nor did they take possession from the salvors. It is true that the defendants were liable to the Government in damages to a limited extent if the goods were lost, and to that extent they were insurers; but underwriters are not liable, and

(1) 15 P. D. 142, at p. 146. (2) 5 R. 742.

if the fact that they had an interest in the preservation of the goods will suffice to involve them in liability, then mortgagees of a ship not in possession, pledgees of bills of lading, vendors of cargo having a lien, would be liable. Here the vessel was under an ordinary time charter, under which her owners provided the master and crew. The shipowner remained in possession of the vessel, the defendants only having the user. The bills of lading in respect of the stores were signed by or on behalf of the master, and the shipowner was the carrier; the defendants were only intermediaries between the ship and the owners of the goods. The owners of the goods were the only persons who could demand them from the salvors, and, the stores being the property of the Government, the salvors had no lien which could be the foundation of the process of the Court by arrest: *The Parlement Belge* (1); and for the same reason, on delivering the goods to the Government the salvors could not proceed in personam against the owner on any implied reservation of rights in rem.

[The following cases were also referred to: *The Meg Merrilies* (2); *The Rapid* (3); *The Johannes* (4); *Nicholson* v. *Chapman.* (5)]

Aspinall, K.C., and *Dawson Miller*, for the respondents (plaintiffs), were not called upon.

LORD ALVERSTONE C.J. We have listened to an able and learned argument from counsel for the appellants, going back into the history and the original foundation of salvage jurisdiction. With the greater part of that argument I entirely agree, and in the judgment I propose to deliver I do not desire in any way to infringe upon any of the main principles contended for.

I think this case is, as was the case before Sir James Hannen (6) and the case in the Scottish Courts (7), of a very special character. The facts are as follows: The

(1) (1880) 5 P. D. 197.
(2) (1837) 3 Hagg. 346.
(3) (1838) 3 Hagg. 419, at p. 422.
(4) (1860) Lush. 182, at p. 187.
(5) (1793) 2 H. Bl. 254; 3 R. R. 374.
(6) *Five Steel Barges*, 15 P. D. 142.
(7) *Duncan* v. *Dundee Shipping Co.*, 5 R. 742.

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defendants became the charterers of a ship for thirty-six months. They might use that ship then for their own purposes, putting their own cargo on board, and charging any rate of freight they could get. A particular amount of freight which they were going to pay to the shipowners was by no means the measure of the freight which they would earn. They could make any particular bargain they liked with the persons who put cargo on board; and it is clear that in this case the bargain between the particular owners of goods and the defendants was different from the bargain between the defendants and the shipowners. Now, in that position of things the defendants come under contract with the Government to carry some Government stores. By the terms of the contract they are to be liable in any event for the delivery of these stores. There are then put on board their hired ship these Government goods which they are going to carry for freight, and that combined adventure then consists of the ship, of the goods belonging to various owners, amongst others the Government, and of the interest that the charterers have in earning the freight. The vessel meets with some disaster, and is salved and towed into an English port. The salvors, for some reason which I do not know, do not arrest the cargo, and the whole adventure then comes back to its original position and the salvage action is brought.

Now, counsel for the appellants do not say that the action in personam cannot be brought against the owners of the ship. They admit, and I do not think they could possibly have contested it, having regard to the long practice, that against any person in the position of owner of the ship an action in personam can be brought. For the same reason they do not say that an action in personam cannot be brought against the owners of the cargo. Therefore, whether or not the foundation of the action was originally that there must have been some arrest, in which I agree, it was not conclusive as to the form of action, because, dealing with the simple case of owner of ship and cargo, certainly an action for salvage can be brought in the Admiralty Court either in personam or in rem.

We now have to consider what is the real position of these

defendants, apart from authority and apart from the decisions to which I will refer in a moment, in respect of the interest which has been the subject of salvage. I think the defendants were bailee of these goods. It is perfectly true that they were put, not upon their own ship, but upon a hired ship; but they were put there in pursuance of a contract made with the defendants and for the purpose of earning freight which was to go into the pocket of the defendants, and under a contract whereby the defendants undertook, if I may use the expression, in the event which happened to deliver these goods. Now, when the accident happened, which led to the salvage, what were the real interests which were at risk and at stake? There was the interest of the owners of the ship, the interest of the owner or charterer in the freight—because the charterers' freight may be an entirely different thing from the owner's freight—in fact, it is quite possible that the chartered freight would not be at risk at all, because it might be something paid for the hire of the ship in advance—and then there is the interest of the owner of the goods. In my opinion that includes, for the purpose of the case which we have to consider, all the persons who were collectively or singly the owners of goods for the purpose of that adventure. I do not think it at all necessary to go through the cases which counsel for the appellants put of persons whose contracts may be affected more or less indirectly by the destruction of the goods. I think that in a common maritime adventure of this kind at least the persons who have the interest of owners in the goods by virtue of the contract they have made for the purpose of delivery have an interest for the purpose of salvage.

Now, before I come to the authorities, which I think are binding upon us in this sense, that they are the authorities of great judges, I wish to say one word upon a part of the argument of counsel for the appellants to which I entirely assent. I agree that in all salvage services there must be some res saved. That was clearly established in the case of *The Renpor* (1), where Lord Esher laid it down that "something must be saved in order to give valid grounds for a salvage

(1) (1883) 8 P. D. 115.

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action." That authority, together with others, is cited in Kennedy J.'s book. (1) I agree with the argument that you must have property saved so as to represent a fund out of which the salvors can be remunerated; but when once you get that, I consider that at any rate at the present day proceedings against the persons who properly can be made liable to pay that salvage may be either in rem or in personam. It is not material to consider what the original object of jurisdiction in personam was. In the present day, both in the county courts and in the superior courts, where property has been saved the people who are liable to pay salvage can be proceeded against in personam.

Now, how do the authorities stand? Speaking for myself, I feel almost bound by an authority of so great a lawyer on such a subject as Sir J. Hannen, under circumstances practically identical with the circumstances of the present case. I should hesitate to overrule his decision in the *Five Steel Barges*. (2) In that case there were five Government barges. Three of them were still in such a position that they could be proceeded against in rem, and were so proceeded against. The other two had been delivered to the Government, and the action was brought against the persons who had previously been interested in these barges. Sir James Hannen used the following words on this point—an action in personam against a person who had been interested in the property: "I think it exists in cases where the defendant has an interest in the property saved, which interest has been saved by the fact that the property is brought into a position of security." With reference to "the subject of salvage," he speaks of an interest in property which has been saved. Further on he says: "it is a legal liability arising out of the fact that property has been saved; that the owner of the property, who has had the benefit of it, shall make remuneration to those who have conferred the benefit upon him, notwithstanding that he has not entered into any contract on the subject. I think that proposition equally applies to the man who has had a benefit arising out of the saving of the property."

(1) The Law of Civil Salvage, 1891, p. 13. (2) 15 P. D. 142.

I do not intend to decide more than is necessary for this case, but, having regard to ordinary commercial relations, in my opinion that test of Sir James Hannen includes, and properly includes, the class of persons within which the defendants in this case come—I mean the charterers of ships who have received goods upon their hired ships and are liable to replace those goods if they are lost, and are interested in the earning of freight for carrying those goods. I do not wish to rely on the Scottish case (1) beyond saying that independently four very learned Scottish judges—I see one was President Inglis—came to the same conclusion. It seems to me that we are justified upon these authorities, as well as upon principle, in coming to the conclusion that the learned judge in the Court below was right.

Counsel for the appellants ingeniously endeavoured to suggest that the reason why proceedings in personam have been taken against the owner of property, whether ship or goods, is because the salvors have handed back the property to the owners for the purpose of continuing the adventure. I see nothing in any of the cases which amounted to special handing back. If actions in personam had been originally founded upon some misrepresentation or inducement by the owners of the goods or ship, whereby they had persuaded the salvor not to stand upon his rights, I could understand the distinction; but, looking at the long-standing authorities and the reasons, I come to the conclusion that these defendants had such a direct interest in these goods, in the fulfilment of the contract of carriage, that they are properly made defendants in this action. Therefore, without attempting to deal with the further developments which it has been argued are the consequences of that view, I am of opinion that the decision of the Court below must be upheld.

A. L. SMITH M.R. The judgment of Sir James Hannen in the *Five Steel Barges* (2) was delivered in 1890, after the judgment of the Scottish Court of Session in the other case referred

(1) *Duncan* v. *Dundee Shipping Co.*, 5 R. 742. (2) 15 P. D. 142.

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to (1), but without that case having been brought to his attention. We therefore have, independently of each other, four Scottish judges, and afterwards Sir James Hannen, spontaneously arriving at the same conclusion. Now, we are asked in the year 1901 to say that all those five learned judges were wrong in that which they decided in those cases. I am prepared to rest my judgment upon that of Sir James Hannen.

ROMER L.J. concurred.

Appeal dismissed.

Solicitors for appellants (defendants): *Parker, Garrett & Holman.*

Solicitors for respondents (plaintiffs): *William A. Crump & Son.*

T. L. M.

[IN THE COURT OF APPEAL.]

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FORBES-SMITH *v.* FORBES-SMITH AND CHADWICK.

Divorce—Jurisdiction—Costs—Co-respondent—Consolidated Suits—Appeal—Final or Interlocutory Order—Leave to Appeal—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 34—*Supreme Court of Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *s.* 5.

A wife having filed a petition for judicial separation, on the ground of her husband's cruelty, the husband afterwards filed a petition for dissolution of the marriage. An order was made for the consolidation of the two suits, and they came on for trial together. The wife's charge against the husband was withdrawn, there being no evidence in support of it; and her petition was dismissed. On the husband's petition a decree nisi was made for dissolution of the marriage, with costs and damages against the co-respondent, and the decree was afterwards made absolute:—

Held, that the consolidation order had not the effect of making the proceedings on the wife's petition part of the proceedings on the husband's petition, and that consequently there was no jurisdiction under s. 34 of the Matrimonial Causes Act, 1857, to order the co-respondent to the husband's petition to pay the costs of the proceedings on the wife's petition.

Decision of Jeune P. reversed.

The question whether the co-respondent could be ordered to pay the

(1) *Duncan* v. *Dundee Shipping Co.*, 5 R. 742.

costs of the wife's petition arose upon the taxation of the costs under the final decree, and was referred by the registrar to the Court.

The President decided that there was jurisdiction under s. 34 to order the co-respondent to pay these costs:—

Held, that this order was part of the final decree, and that consequently an appeal against the order could be brought without the leave of the Court.

The City of Manchester, (1880) 5 P. D. 221, and *Marsden* v. *Lancashire and Yorkshire Ry. Co.*, (1881) 7 Q. B. D. 641, followed.

UPON the taxation of costs against the co-respondent to this suit a question arose as to the extent of the jurisdiction conferred by s. 34 of the Matrimonial Causes Act, 1857.

The question was referred by the registrar to the Court.

On February 2, 1900, the wife presented a petition for a judicial separation, on the ground of her husband's cruelty.

On March 27, 1900, the husband presented a petition for the dissolution of the marriage, on the ground of the wife's adultery with the co-respondent Chadwick, claiming also damages against the co-respondent.

On April 26, 1900, the registrar made an order that the husband's suit should be consolidated with the wife's suit. Before this order was made the registrar sent in the ordinary way a notice to each of the parties (including the co-respondent) of his intention to make it, inviting each party to shew cause against the order. The co-respondent did not raise any objection to the making of the order.

The wife by her answer to the husband's petition, filed June 2, 1900, merely denied the alleged adultery. The co-respondent by his answer, filed June 7, 1900, also denied the adultery.

The suits came on for trial by the President with a jury on July 18, 1900. The wife's counsel then stated to the Court that they had no evidence in support of the charges of cruelty against the husband, and that they must withdraw those charges. The wife's petition was accordingly dismissed. On the husband's petition the jury found that the adultery was proved as against the wife and the co-respondent, and they awarded 1250*l.* damages against the co-respondent. A decree nisi was made for dissolution of the marriage with costs and

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damages against the co-respondent. On January 28, 1901, the decree was made absolute.

On the taxation of costs the husband claimed to tax against the co-respondent, not only his costs of his own petition, but also his costs of the wife's petition, on the ground that by reason of the consolidation order the proceedings in the two suits were united and had become "the proceedings" within the meaning of s. 34 (1) of the Matrimonial Causes Act, 1857. The matter was referred by the registrar to the Court.

H. Durley Grazebrook, for the husband.
R. E. Moore, for the co-respondent.

May 20. SIR F. H. JEUNE P. This case raises the question whether when there is a petition by a wife for a judicial separation, and afterwards the husband petitions for a divorce, a co-respondent being of course joined, and, the suits being before the trial consolidated, the husband succeeds on his petition and the wife fails on hers—whether under these circumstances the co-respondent can be ordered to pay the costs, not only of that part of the consolidated suit to which he was a party, but also of that part of the consolidated suit to which he was not a party. It is, I think, remarkable that, though it has been usual to order a co-respondent to pay costs in such a case, the question has never been formally decided before; but so it is, and there is no distinct authority upon it.

Now s. 34 of the Act of 1857 is, I think, that which governs this matter. [The learned judge read the section.] It speaks

(1) Sect. 34: "Whenever in any petition presented by a husband the alleged adulterer shall have been made a co-respondent, and the adultery shall have been established, it shall be lawful for the Court to order the adulterer to pay the whole or any part of the costs of the proceedings."

By s. 5 of the Supreme Court of Judicature Act, 1890, "Subject to the Supreme Court of Judicature Acts, and the rules of Court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge, and the Court or judge shall have full power to determine by whom and to what extent such costs are to be paid."

of "the costs of the proceedings"—not of the proceedings specifically of that petition, but of "the proceedings" in the most general terms. I think the words in their collocation are important. But it is said that in case I should think that s. 34 of the Act of 1857 is not sufficient to enable me to order the co-respondent to pay the costs of the proceedings in the wife's suit, s. 5 of the Supreme Court of Judicature Act, 1890, would authorize me to do so. The words of that section are no doubt extremely general. [The learned judge read the section.] I agree that the decisions upon that section shew that it was intended to confer in some cases a new jurisdiction. But, in the first place, though the words are so general, it cannot, I think, be doubted that this limitation must be understood—that the person who is ordered to pay the costs is connected with the proceedings. It cannot be supposed for a moment that a person not interested in or connected with the proceedings could be ordered to pay the costs of them. Therefore, I think the section must be read with that limitation; and if that is so, it does not help the present respondent, because the very question on this appeal is, whether the co-respondent was sufficiently connected with the proceedings initiated by the wife to enable an order for costs of those proceedings to be made against him. But, moreover, this s. 5 is in terms made subject to the express provisions of any statute. Therefore, it is subject to the express provisions of s. 34 of the Act of 1857, and I think it may be fairly said that the special provision of s. 34 was not intended to be affected by the more general provision of s. 5 of the Act of 1890. We come back, therefore, to the provision of s. 34 of the Act of 1857.

The facts, so far as they are material, are these. Upon the evidence I cannot doubt that the association between the wife and the co-respondent must be carried back at least as far as April, 1899. Then on August 8, 1899, she left her husband, and on February 2, 1900, she filed her petition for a judicial separation, and his petition for a divorce followed on March 27. On April 26, 1900, the two suits were consolidated, and they were afterwards set down and were heard together.

The charges brought by the wife were charges of cruelty

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and it is quite clear, first, that they were never well founded; and, secondly, that no real allegation was made, because no particulars could be delivered except of charges which arose after April, 1899. I mention these facts because they may have a bearing on the exercise of discretion, though they have no bearing on the question of jurisdiction, except in so far as they shew that the wife filed her petition a short time before the husband filed his, and the two suits were consolidated. Under those circumstances, what is the effect of s. 34 of the Act of 1857? I am not inclined to cut down in any respect the words of that section. The expression "the proceedings" is a very general one, and it is not confined to those matters with which the co-respondent has a direct connection. It has always, so far as I know, been the practice of this Court under that section (it has certainly been very frequently, if not invariably, done) to order the co-respondent to pay the costs, e.g., of a variation of settlements consequent on the result of the suit. The co-respondent is no party to that, he has nothing to do with that matter, and I do not suppose he has ever applied to be heard, and certainly he never has been heard, on that subject.

And again, supposing some proceedings had taken place in the suit before the co-respondent had been actually served, it cannot, I think, be doubted that he could be made liable for the costs of those proceedings, they being part of "the proceedings" in the suit, though not proceedings to which he was actually at the time a party. I am inclined, therefore, to give very great force to the words "costs of the proceedings." In some cases, of course, charges of cruelty against a petitioning husband are not well founded. It is well known to every practitioner in this Court that that is so very often, whether a wife petitions for judicial separation on her own account or alleges cruelty in answer to the husband's petition for a divorce. That is a mere matter of form, and sometimes both courses are adopted. If the wife files her own petition on the ground of cruelty, I do not think it is material whether she does or does not set up the cruelty in answer to her husband's petition. But when there is a petition by the husband and also a peti-

tion by the wife, she probably filing her petition first in order to get the first word, it seems to me that there may well be cases in which the two petitions are so closely connected that the whole really constitute one set of proceedings; and when the two suits are consolidated for the purposes of trial, and, I think, for all purposes, and a decree nisi is pronounced in that consolidated suit, primâ facie, at any rate, the terms of the section would be applicable to the whole of the consolidated suit in both its branches. The two streams have flowed together, and, though they may have had different sources, at some time they became connected and became one.

But I do not wish to lay too much stress on the consolidation, because that might limit the jurisdiction to the period at which the consolidation order was made. I take a rather broader view than that. I think that when the cases are so closely connected as these are and they are tried together, the whole become one set of proceedings (I do not say one suit, because they are two suits), and the Court has a discretion, which must be exercised with regard to the facts of each case, whether the co-respondent shall pay the costs of the whole of the proceedings in both suits or of any part of those proceedings. I think it is a matter of discretion. I can easily imagine cases in which it would be very unjust to order the co-respondent to pay the costs of an earlier suit by the wife, because the quarrel between the husband and wife and the alleged cruelty had gone back to a period at which the co-respondent had no connection with the matter. It might be that he came on the scene long after, and even perhaps after a separation between the husband and wife. Under such circumstances, to say that the co-respondent ought to pay the costs occasioned by the previous quarrel of the husband and wife, with which he had nothing to do, would be extremely unjust. On the other hand, I can easily imagine cases in which the co-respondent was really the person to blame for the whole matter, the husband and wife having lived in harmony up to the time at which the co-respondent came on the scene, and then, there having been quarrels between them, the wife presented a petition, the husband doing so afterwards. In such a case it would be

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clear that the co-respondent was to blame for the whole matter. Therefore I think that in all cases the Court is not limited by a want of jurisdiction, though it may be limited as to the discretion to be exercised with regard to the facts of each particular case.

In my opinion, when there is first a petition by the wife, and there is afterwards a petition by the husband, and the two suits are consolidated in this way, the Court has power to deal with the whole of the proceedings in both suits, and to treat them as one set of proceedings of the costs of which the adulterer may be ordered to pay the whole or any part. This and this only will ensure justice being done as no doubt the Act contemplated it should be done. If the wife succeeds in the first of the consolidated suits, the co-respondent would get the benefit of her success. It is just he should pay the costs if she fails, and to my mind no distinction should be drawn, as I believe it never has been drawn in this Court, between the cases of the wife making her charges in her answer or in a separate petition.

This disposes of the point of law, and I found my decision on the construction of s. 34 of the Act of 1857. I do not think it necessary to rely on the additional power conferred by s. 5 of the Act of 1890.

Then arises the question of discretion; and in my opinion this is one of the cases in which the liability of the co-respondent cannot be limited merely to the issues raised in that suit to which he was directly and actually a party.

Having regard to the evidence, I have no doubt that in justice the co-respondent ought to be ordered to pay the costs of the whole of the proceedings, by which I mean the costs occasioned by the wife's petition as well as those occasioned by that petition to which he was actually a party.

There was some doubt whether the order of the President was interlocutory or final, and the co-respondent applied for leave to appeal. Leave to appeal was refused by both the President and the Court of Appeal. The co-respondent notwithstanding the refusal gave notice of appeal.

June 13. *Marshall Hall, K.C.*, and *R. E. Moore*, for the co-respondent. The jurisdiction to award costs against a co-respondent is conferred by s. 34 of the Matrimonial Causes Act, 1857. The words "the proceedings" in the latter part of that section must be read in connection with the prior words "in any petition presented by a husband," and it is submitted that the jurisdiction to order a co-respondent to pay costs is limited to the costs of the proceedings under a petition presented by the husband. The consolidation order did not make the co-respondent a party to the wife's petition. Such an order is made only for the convenience of the husband and wife, so that the two suits may be tried together. The order does not destroy the separate identity of the two suits. They are still two distinct suits with separate and distinct issues. The effect of the order was really only to stay the proceedings in the earlier suit until the later suit should come on for trial.

[COLLINS L.J. The effect of the consolidation order was to introduce the issue of the husband's cruelty, which might have been a defence to his petition.]

It might have been a defence, but the wife did not raise it; she simply denied the adultery. The co-respondent did not raise the charge of cruelty, and he put the husband to no expense in relation to it. It turned out that there was no foundation for the charge, and the learned President's order compels the co-respondent to pay the costs of an unfounded charge recklessly put forward by the wife without his privity. It would be unjust to order the co-respondent to pay those costs. Sect. 5 of the Supreme Court of Judicature Act, 1890, was relied upon on behalf of the husband. But the power thereby given to the Court or a judge "to determine by whom and to what extent such costs are to be paid" must, as the learned President said, be limited to the parties to the proceedings. It cannot be a power to order any outsider to pay costs. And, moreover, the power is in terms made "subject to the express provisions of any statute," and is therefore subject to the provisions of s. 34 of the Act of 1857.

The jurisdiction to order the co-respondent to pay these costs must, if it exists at all, rest upon the effect of the consolidation

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order. The rules of the Supreme Court do not apply to divorce proceedings: Order LXVIII., r. 1 (*d*). The Divorce Acts and the Divorce Court Rules are silent as to consolidation. With regard to consolidation under the Judicature Act, rule 8 of Order XLIX. only provides that "causes or matters pending in the same Division may be consolidated by order of the Court or a judge in the manner in use before the commencement of the principal Act in the Superior Courts of Common Law." Under the Common Law Procedure Act there were always two judgments when two actions were consolidated. By rule 2 of Order LXXII., "Where no other provision is made by the Acts or these rules, the present procedure and practice remain in force." Therefore, in divorce proceedings the procedure and practice of the Divorce Court under the Act of 1857 remain in force, and for the present purpose s. 34 is the governing section, and the proceedings there referred to must be the proceedings initiated by the husband's petition.

[COLLINS L.J. It comes to this—whether the original petition by the wife is now part of "the proceedings."]

H. Durley Grazebrook, for the husband. The order from which the appeal is brought was an interlocutory order, from which an appeal cannot be brought without the leave of the Court: Supreme Court of Judicature (Procedure) Act, 1894, s. 1. Leave to appeal was refused by both the President and by this Court.

That this was an interlocutory order is shewn by *In re Binstead* (1); *Blakey* v. *Latham*. (2) The Court held in the latter case that the order was "only an order for working out the rights given by a final judgment." That exactly applies to the present case. The decree for dissolution of the marriage was the "final judgment," and it directed the co-respondent to pay the costs of the proceedings. That judgment was worked out by the order now under appeal.

Upon the merits it is submitted that the order of the learned President was right. The effect of the consolidation order was to make the two suits proceed as one. The first suit became part of "the proceedings." Here the husband and wife had

(1) [1893] 1 Q. B. 199, 203. (2) (1889) 43 Ch. D. 23, 25.

separated long before any proceedings were commenced. The husband before he could file his petition had to make an investigation which occupied a long time, and the wife's solicitors, knowing what was coming, filed her petition first.

[COLLINS L.J. The nature of consolidation in common law actions is explained in Lush's Practice, 2nd ed. p. 752. The consolidation of cross-actions was not known at common law.]

After consolidation only one decree is made in the two suits, not two separate decrees. The practice is to treat the two suits as one from the beginning.

But, independently of s. 34 of the Act of 1857, it is submitted that s. 5 of the Act of 1890 gave the Court ample power to make the order. That section created a new jurisdiction as to costs: *London County Council* v. *Churchwardens, &c., of West Ham* (1); *In re Fisher.* (2)

Marshall Hall, K.C., in reply. This appeal is really against the decree absolute. The order to pay costs is not operative until the final decree is made. In *In re Binstead* (3) the question was whether an order that a co-respondent should pay costs was a "final judgment" within the meaning of s. 4 of the Bankruptcy Act, 1883. That this order is "final" as regards the necessity of obtaining leave to appeal is shewn by *The City of Manchester* (4); *Marsden* v. *Lancashire and Yorkshire Ry. Co.* (5) If the order to pay costs is made under the jurisdiction conferred by the Act it is a final order, and leave to appeal is not required.

The consolidation order only enabled the two suits to come on for trial together; the suits remained separate. If there was no judgment in the first suit, that is not the fault of the co-respondent. But, there being no judgment, there is no jurisdiction to order him to pay costs in that suit. In s. 40 of the Common Law Procedure Act, 1852, consolidation is referred to as a well-known procedure. There cannot be a consolidation of two actions in the strict sense unless the issues in them are the same, and here the issues in the two suits are different. As

(1) [1892] 2 Q. B. 173.
(2) [1894] 1 Ch. 450.
(3) [1893] 1 Q. B. 199.
(4) 5 P. D. 221, 223.
(5) 7 Q. B. D. 641.

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to s. 5 of the Act of 1890, though the words are very general they must be limited to the parties to the proceedings.

RIGBY L.J. For the reasons which my brother Collins will state in detail, I think there was no jurisdiction to order the co-respondent to pay the costs of the proceedings upon the wife's petition, and therefore I think the decision of the learned President ought to be reversed.

COLLINS L.J. The first question is, whether there is any right of appeal at all. It is said that the order appealed from was an interlocutory one, and leave to appeal from it has not been obtained. If the order was interlocutory, it is clear that an appeal cannot be brought without the leave of the Court. But, having regard to the authorities which have been cited by the appellant's counsel, I have come to the conclusion that the order was a final one, and consequently the leave of the Court is not required. [The Lord Justice stated the facts, and continued:—]

It appears to me that the order of the President is under the circumstances really part of the final judgment. There was no jurisdiction to make any order as to costs except as part of the final judgment; and although the order which interpreted the final judgment was not originally part of it and was separated from it by some days, I think it was not the less a part of the final judgment. It seems to me that *The City of Manchester* (1) is an authority for so holding. In that case, in an action for a a collision at sea by which the plaintiffs' ship was sunk, the Admiralty Division on April 25 pronounced judgment, holding both vessels to blame, and ordered the owners of the *City of Manchester* to pay the plaintiffs half their damages. On May 20 a supplemental order was made, giving the plaintiffs their costs of the action. On appeal by the defendants it was objected that the second order was interlocutory, and that the appeal, having been brought after twenty-one days, was too late. The Court of Appeal held that the order was final. James L.J. said (2): "The order as to costs which is under appeal can

(1) 5 P. D. 221. (2) 5 P. D. at p. 223.

only be sustained on the ground of its being part of the decree, for if the case had been disposed of by a final judgment the Court would have had no jurisdiction to make a subsequent order. There is, therefore, no ground for the objection that this is an interlocutory order which must be appealed from within twenty-one days." And I think *Marsden* v. *Lancashire and Yorkshire Ry. Co.* (1) bears out the same view. In my opinion, this order was not an interlocutory order for working out the final decree, but was part and parcel of the final decree itself.

This then being an appeal against a final order, the question next arises whether the decision was right. The parties have consented that the appeal shall be heard by two judges. Can the order be maintained? The question turns upon s. 34 of the Matrimonial Causes Act, 1857. The power to order a co-respondent to pay costs is a statutory one; the Court has no inherent power to visit with costs a co-respondent who is not in the strictest sense of the word a "party" to the proceedings. He is introduced into the suit by virtue of the provisions of the statute. It seems to me that the learned President was quite right in holding that the power given by s. 34 is limited to persons who are parties to "the proceedings." And I think "the proceedings" must mean the proceedings in a suit to which the co-respondent is a party, i.e., the proceedings upon "a petition presented by a husband." The section gives no power of itself to visit with costs any person who is not a party to the proceedings.

Then comes the fact that an order was made for the consolidation of the two suits, and it seems to me that rightly considered this was not a "consolidation" order in the only sense which would make it material for the present purpose. No power to consolidate suits is given by the Matrimonial Causes Act, or in the Divorce Court Rules made thereunder. Then, if we endeavour to ascertain the meaning of consolidation in the Supreme Court, we find that by rule 8 of Order XLIX., "Causes or matters pending in the same Division may be consolidated by order of the Court or a judge in the manner in use

(1) 7 Q. B. D. 641.

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before the commencement of the principal Act in the Superior Courts of Common Law." That throws us back upon what was meant by consolidation in the Common Law Courts before the Judicature Act, and this is thus stated in Lush's Practice, 2nd ed. at p. 752: "If two or more actions are depending at one time by the same plaintiff against the same defendant, for causes which may be joined—i.e., causes of whatever kind, except replevin and ejectment, provided they be by and against the same parties and in the same rights—the Courts or a judge will sometimes order them to be consolidated, and compel the plaintiff to pay the costs of the application . . . . Thus several actions in respect of several trespasses on the same premises at different times have been consolidated on the above terms. But in actions against different defendants the Courts have not always felt at liberty to interfere . . . . The criterion as to the power of the Court to interfere seems to be, whether the causes of action could have been originally joined; their inclination to do so will of course depend upon the particular circumstances of the case under their consideration. Actions of ejectment depending upon the same title, and which may be tried in one writ, are frequently consolidated. And another instance is where several actions are brought on the same policy of sea insurance against each of the underwriters. Under such circumstances, the Court or a judge will either consolidate or (as in the cases above instanced) order proceedings in all but one to be stayed, on condition of the defendants' undertaking to be bound by the result of that action, and to pay the amount of their respective subscriptions and costs, with such other terms as may be agreed on, or (if the order be made against the plaintiff's consent) imposed by the Court or judge."

The cases there mentioned are all cases of actions brought by the same plaintiff, and capable of being joined in one writ, and the term "consolidation" cannot, as it seems to me, have any application when the actions or suits are brought by different persons, one by A. against B. and another by B. against A. To apply the term "consolidation" to such a case as the present would be a misuse, or, at any rate, a loose use of the term, and I cannot see that in such a case

the suits can, strictly speaking, be consolidated. Unless the two suits are made one, so that the costs of the wife's petition can properly be described as part of the costs of the husband's petition, the Court has no power under s. 34 to compel the co-respondent to pay the costs of the wife's petition. We cannot visit him with the costs of proceedings to which he was not a party. The jurisdiction arises only if the proceedings on the wife's petition have become part of the proceedings on the husband's petition, and I do not think that is the result of the order for consolidation. In my opinion there has been nothing analogous to consolidation at common law. The practice of trying at the same time petitions by a husband and a wife has been adopted merely for convenience, and does not operate to consolidate the two suits in the sense of constituting one suit out of the two.

The last point taken was upon s. 5 of the Act of 1890. The learned President has satisfactorily disposed of the argument upon that section, and I entirely concur with him. Some limitation must be put upon the generality of the words. They cannot enable the Court to order the costs to be paid by a stranger to the proceedings; they can only mean that the Court may order the costs to be paid by any of the parties. The section does not confer jurisdiction to visit a co-respondent with costs unless he is a party to the proceedings; and here the co-respondent was not a party to the wife's petition unless the consolidation order has made him one. I have already stated my reasons for holding that the consolidation order had no such effect. In my opinion, therefore, the learned President had no jurisdiction to order the co-respondent to pay the costs of the proceedings on the wife's petition, though, if he had jurisdiction, he may have had abundant ground for exercising his discretion in that way.

Appeal allowed.

Solicitors: *Fladgate & Co.; Williamson, Hill & Co.*

W. L. C.

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1901
May 22, 23.

[IN THE COURT OF APPEAL.]

THE HEATHER BELL.

Admiralty—Ship—Mortgage—Charterparty — Wrongful Seizure — Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 34—*Counter-claim for Wages paid—Implied Request.*

The plaintiff entered into an agreement with the owners of a steam vessel to run her on specified daily excursion trips for about six weeks, dividing the profits after deducting expenses, and advancing the money to liberate part of the machinery held as a lien for repairs. In respect of the advance for the liberation of the machinery, and other advances previously made, as well as in respect of any repairs executed, the plaintiff to have "a charge and lien on the boat ranking in the highest position the owners are able to fix having regard to the existing circumstances."

A week after the trips commenced an instalment of the purchase-money owing to the defendant, the former owner of the vessel, fell due, and, on non-payment, the defendant, under a mortgage given by way of collateral security, seized her, alleging that the agreement between the plaintiff and the owners of the vessel was not binding upon him as it postponed his rights as mortgagee and depreciated the saleable value of the vessel. In an action for wrongful seizure, Sir F. H. Jeune P. gave judgment in favour of the plaintiff ([1901] P. 143) on the ground that the charge and lien on the vessel were subordinated to the rights of the defendant as mortgagee, and the mode of employment was not unusual for a vessel of the description of the steamer in question :—

Held, by the Court of Appeal (Lord Alverstone C.J., A. L. Smith M.R. and Romer L.J.), affirming the decision of the Court below, that the agreement was binding on the mortgagee, for, though the powers of a mortgagor, as owner, are, by s. 34 of the Merchant Shipping Act, 1894, limited by the proviso, "Except as far as may be necessary for making a mortgaged ship available as a security for the mortgage debt," these powers had not been exceeded, the test to be applied being that laid down in *Collins* v. *Lamport*, (1864) 34 L. J. (Ch.) 196, namely, whether the mortgagor's dealings with the vessel materially impair the security.

APPEAL by defendant, the mortgagee of a vessel, and cross-appeal by plaintiff, the charterer, against a decision of Sir F. H. Jeune P. in favour of the plaintiff on a claim for damages for wrongful possession, and in favour of the defendant on a counter-claim for money paid for wages. (1)

(1) Ante, p. 143.

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The question turned on the extent of the powers of the mortgagor of a vessel as owner in possession under s. 34 of the Merchant Shipping Act, 1894. (1)

The material facts were shortly as follows :—

On July 4, 1900, the defendant Thomas William Ward sold the paddle steamer *Heather Bell* to the South Coast and Continental Service, Limited, for 2500*l.*, of which sum 625*l.* was paid in cash, and the balance was to be paid with interest by three bills for 625*l.*, each at two, four, and six months respectively, the instalments with interest at 6 per cent. being secured by a first mortgage dated July 9 and registered July 13, together with policies of insurance for 3000*l.* indorsed in favour of the vendor.

On July 30 the South Coast and Continental Service, Limited, as owners of the *Heather Bell*, chartered her to her master Captain Sims for passenger traffic between Liverpool, Rhos-on-Sea, Llandudno, and Menai Straits, from August 2 to October 1, for 850*l.*, half of which sum was to be paid on delivery of the vessel, and the other half within ten days of that time, Captain Sims paying all working expenses. The following memorandum was added : " With reference to the charter of this boat, it is agreed that although she is chartered in my name, it is understood that she is to be run by me for the joint benefit, and on the joint account of myself and the owners, and that I take one-half of the profits, the other half to the owners."

On August 23 the company with whom the vessel was insured threatened to cancel the policies unless the balance of premiums was paid, and on August 24 Captain Sims' charter was cancelled.

On August 29 the South Coast and Continental Service, Limited, as owners of the *Heather Bell*, agreed to charter her until October 15 to the plaintiff William Horton, who had been advancing the money to work the boat under Captain Sims'

(1) 57 & 58 Vict. c. 60, s. 34 : " Except as far as may be necessary for making a mortgaged ship or share available as a security for the mortgage debt, the mortgagee shall not by reason of the mortgage be deemed the owner of the ship or share, nor shall the mortgagor be deemed to have ceased to be owner thereof."

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charter, and who, as owner of the Abbey Hotel at Rhos, in Colwyn Bay, North Wales, was desirous of having an excursion steamer running from Liverpool during the summer season and calling at his pier.

The memorandum of agreement was as follows:—

"1. The boat shall be delivered to W. Horton at Liverpool forthwith as she now is, without any guarantee on the part of the owners as to her present condition and equipment. The vessel shall be used for passenger and merchandise traffic between Liverpool, Rhos-on-Sea, Llandudno, Menai Straits, Colwyn Bay, and Rhyl, and not otherwise without the consent in writing of the owners.

"2. It is admitted that at the present time part of the machinery of the boat is held as a lien for repairs thereto, and it has been agreed that the said W. Horton will advance such amount as may be necessary to liberate such machinery, and shall add same to what is already due to him thereon.

"3. The owners also admit that W. Horton has advanced certain other sums in connection with the boat, for which sums it is agreed that the said W. Horton shall have a charge and lien on the boat ranking in the highest position the owners are able to fix the same having regard to the existing circumstances.

"4. The said W. Horton is hereby authorized to sell such of the effects on board the boat as may not be requisite or necessary for the use of the boat and the service aforesaid, but shall bring the proceeds into the accounts hereafter mentioned.

"5. The said W. Horton shall be in no way responsible for the boat or for any repairs which may from time to time be necessary or desirable, but any repairs he thinks fit to execute shall be added to his charge and lien.

"6. The owners will keep properly insured the boat against all usual risks.

"7. The charterer shall keep true and exact accounts of all receipts for passage money, for freight on merchandise, and from the sale of wine, spirits, and other refreshments on board, and of all payments for wages, coal, oil, and other stores, con-

sumable and otherwise, and expenses of the service. The before-mentioned expenses shall be paid out of the before-mentioned receipts, and such accounts of receipts and expenditure shall be made up weekly between the owners and the charterer.

"8. The profits of the venture (if any) shall belong to and be divided in equal shares and proportions between the owners and the charterer at the expiration of the charter.

"9. If any dispute shall arise as to the meaning of this charter, or upon any question arising thereunder, the same shall be referred to and settled by arbitration, pursuant to the provisions of the Arbitration Act or Acts now in force.

"10. In case the mortgagees of the said vessel shall exercise their rights (if any), and thereby the charter hereby granted shall be affected, the owners shall not be responsible to the charterer in damages or otherwise in respect thereof.

"11. If it should be found after trial that the boat is being run at a loss, the charterer shall be at liberty to discontinue or to modify the service in such way as he may think desirable."

The South Coast and Continental Service, Limited, failed to meet the first bill for an instalment of the purchase-money which fell due on September 4, and on September 8 the defendant, as mortgagee, took possession of the vessel, thereby preventing the execution of the agreement for the remaining period of five weeks and two days.

On November 6 the plaintiff, as charterer, commenced an action against the defendant, as mortgagee, for the wrongful seizure of the steamship whilst in possession of the plaintiff under the agreement of August 29, and by way of damages claimed 300*l.*, namely, 250*l.*, half the estimated profits, and 50*l.* for pier tolls. The defendant pleaded, inter alia, that the alleged agreement was not binding upon him, as not being beneficial to his security, and alternatively paid 2*l.* into court in satisfaction of any damage sustained. The defendant also counter-claimed for 30*l.* 14*s.* 6*d.*, money paid by him after taking possession of the *Heather Bell* in respect of wages from September 1 to 7, 1900, accrued due to the master and crew

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prior to the date of taking possession, and in respect of which the master and crew had threatened to arrest the vessel. The nature of the correspondence prior to the payment of the wages is sufficiently referred to in the judgment of the Lord Chief Justice.

On March 4, 1901, the President (Sir F. H. Jeune) delivered a considered judgment (1), in which, after reviewing the authorities, he held that the seizure was wrongful, for the charge and lien on the vessel given to the plaintiff by her owners were subordinated to the rights of the defendant as mortgagee, so that his security was not impaired, and the mode of employment was not unusual for a vessel of the description of the steamer in question, so that her saleable value was not reduced.

The learned judge, therefore, gave judgment for the plaintiff with costs, and directed an inquiry as to the amount of damages.

On March 25 the President gave judgment (2) in favour of the counter-claim for wages paid by the defendant and due to the master and crew before the defendant seized the vessel, holding on the facts that "it would not be too far to go . . . . to say that there was an implied request," because "notice was distinctly given of the intention to pay these sums, so that it would have been open for the plaintiff to say, 'No, don't pay for me; I will deal with the matter myself,' and he took no such step." On the law the learned judge, after considering the cases of *Johnson* v. *Royal Mail Steam Packet Co.* (3) and *The Orchis* (4), said: "In this case there was a threat of seizure by those, namely, the master and crew, who had the power to seize, and although the mortgagee's ownership is not exactly the same as that of the actual owner, still, for all real interests and purposes, looking at the law in it broadest aspect, it appears to me clear that the mortgagee, in order to protect the property in which at the moment he was in possession in fact—whether rightly or not does not matter—was compelled to pay certain sums, and that

(1) Set out in full, ante, at pp. 148 to 153.
(2) Set out in full, ante, at pp. 154 to 156.
(3) (1867) L. R. 3 C. P. 38.
(4) (1889) 15 P. D. 38.

the reason was that it was by the default of the plaintiff that they were unpaid."

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On appeal :—

May 22, 23. *Robson*, *K.C.*, and *Ernest M. Pollock*, for the appellant (defendant). On the mortgagors making default in payment of the instalment of the purchase-money, the defendant was entitled not only to take possession of the *Heather Bell*, but also to set aside the agreement between them and the plaintiff, for it is clear from the evidence that the plaintiff was financing the vessel whilst she was chartered to Captain Sims, when she was running at a heavy loss, and the plaintiff, suspecting that the instalment of the purchase-money due on September 4 would not be paid, endeavoured to secure himself for the advances he had made by procuring the cancellation of Captain Sims' charter and the substitution of the agreement of August 29. The effect of that so-called charter was to create a partnership between the mortgagors and the plaintiff, by which the vessel was saddled with a debt, and the plaintiff, as charterer, could work her without any profit accruing to the mortgagors of which the mortgagee could take advantage, the result being that the rights of the mortgagee were postponed, and his security no longer that of a freight-earning ship—in other words, the mortgagee's security was materially impaired. This is the test to be applied to ascertain the extent of the powers of a mortgagor in possession who is deemed, under s. 34 of the Merchant Shipping Act, 1894, not to have ceased to be owner. See per Lord Westbury in *Collins* v. *Lamport* (1), decided on the corresponding section of the Merchant Shipping Act, 1854.

It is also in evidence that on August 23 the insurance company threatened to cancel the policies unless the balance of premium amounting to 28*l.* 6*s.* 3*d.* was paid, and a mortgagee is entitled in a question between him and the charterer to interfere and prevent the vessel proceeding to sea whilst uninsured: *Laming* v. *Seater*. (2)

(1) 34 L. J. (Ch.) 196.

(2) (1889) 16 R. 828.

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The motive influencing the plaintiff in obtaining the agreement of August 29 was the development of his estate at Rhos, and it was with that view that the unusual clauses, not to be found in an ordinary charter, were inserted. A mortgagor is not entitled to enter into such engagements as will override the mortgage, and let the vessel out to make no profit; otherwise he might deprive the mortgagee of the whole benefit of his security, as, for example, by chartering the vessel for several years and assigning the freight behind the back of the mortgagee. This he cannot do: *Brown* v. *Tanner*. (1)

Carver, *K.C.*, and *Leslie Scott*, for the respondent (plaintiff), were only called upon to support the cross-appeal in respect of the counter-claim. The defendant took possession wrongfully. That distinguishes the case from *Johnson* v. *Royal Mail Steam Packet Co.* (2), which was relied on in the Court below. There the mortgagee had rightfully taken possession; and, shortly after, the crew took proceedings in Admiralty to recover their wages. The mortgagee paid these wages, and was held entitled to recover them from the charterer under the money count on the ground that the mortgagee, by compulsion of law, had paid a debt for which the charterer was liable. The law is laid down by Butt J. in *The Orchis* (3) in these words: "It is clear, on authority, that if a man is entitled to possession of a chattel and can only get possession of that chattel by paying a debt which another is legally compellable to pay, and he does pay that debt, the law will imply a promise on the part of the other to repay him what he so disburses." Here no promise by the plaintiff to repay the defendant will be implied, for though the crew had threatened to arrest the vessel they had not done so; and the defendant, who was not entitled to set aside the charter and take possession, only paid off the crew to get rid of them and lay the vessel up. The correspondence, which was also relied on in the Court below as establishing an implied request, goes no further than this—that the defendant wrote to the effect that he would pay the crew off, and, obtaining no answer from

(1) (1868) L. R. 3 Ch. 597. (2) L. R. 3 C. P. 38.
(3) 15 P. D. 38, at p. 41.

the plaintiff, proceeded to pay them off; but silence does not give consent.

LORD ALVERSTONE C.J. I will deal with the cross-appeal first.

The defendant, being the mortgagee of the vessel, took possession, as he was entitled to do, but subject to an agreement which we think he was not entitled to set aside. Therefore he wrongfully took possession. If that was all that had happened and he had thought fit to pay the wages due, I think it would be very difficult to hold that there was an implied request. I express no opinion with regard to the second ground upon which the learned judge has decided in favour of the defendant; but after the seizure of the vessel the parties negotiated, and while that was going on the defendant wrote: "Wages are still going on; had we not better pay the crew off?" On two occasions he asked that question and received no reply, and the learned judge came to the conclusion that there was an implied request. We think it was quite open for him to come to that conclusion, and, therefore, on that ground we think the counter-claim was right and the cross-appeal must be dismissed. With regard to the costs, we think the order of the President giving the plaintiff the costs ought to stand, and the costs of the reference will be reserved.

Now as to the main appeal, which is that the mortgagee has a right to say that the agreement entered into on August 29 between the mortgagor and the plaintiff was invalid as against him. An instalment of the purchase-money became due on September 7, and there is some evidence that the plaintiff suspected that under certain circumstances that instalment would not be paid, and that the mortgagee might enforce his rights; but it does not follow that the mortgagee would take possession. We have to consider what are the rights of a mortgagor of a ship who is in possession, and the rights of the mortgagee arising from the mortgage only. I may say that I think on the evidence no fraud was, or could be, imputed against the plaintiff, who, as we are told, is a solicitor and a gentleman interested in developing his estate at Rhos by running

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steamers to bring traffic and tourists from Liverpool during the summer months.

Now, the position of mortgagee and mortgagor is defined by statute. Sect. 34 of the Merchant Shipping Act, 1894—which is similar to the section of the Act of 1854 referred to in *Collins* v. *Lamport* (1)—provides that "except as far as may be necessary for making a mortgaged ship or share available as a security for the mortgage debt, the mortgagee shall not by reason of the mortgage be deemed the owner of the ship or share, nor shall the mortgagor be deemed to have ceased to be owner thereof." It is obvious that if the owner remains in possession he may enter into contracts dealing with the ship. When that question came before Lord Westbury in *Collins* v. *Lamport* (1), the only test which he laid down in the several passages which have been read from the judgment is whether the dealings materially impair the security of the mortgagee. If not, then they are to stand. When that test was discussed in the House of Lords in *Keith* v. *Burrows* (2), Lord Cairns used language in which I do not think he meant to go further, but which puts it in a somewhat different way. He says: "The mortgagee of a ship does not, ordinarily speaking, or by a mortgage such as existed in the present case, obtain any transfer by way of contract or assignment of the freight, nor does the mortgagor of a ship undertake to employ the ship in any particular way, or indeed to employ the ship so as to earn freight at all. The mortgagor of a ship may allow the ship to lie tranquil in dock, or he may employ it in any part of the world, not in earning freight, but for the purpose of bringing home goods of his own or for his own benefit." And later on, having referred to the incidents of contract, he says (2): "All those acts would be the ordinary incidents of the ownership of the mortgagor, who remains the dominus of the ship with regard to everything connected with its employment, until the moment arrives when the mortgagee takes possession."

Now, the real question is, Was this contract of August 29 one which would materially impair the security? At first I confess I did not like the transaction, and thought it required

(1) 34 L. J. (Ch.) 196. (2) (1877) 2 App. Cas. 636, at p. 645.

investigation. Now that I have heard all the evidence it amounts to this: No fraud is imputed, no improper conduct alleged, and the Sims' contract not having apparently provided a profit, and he not being able to pay the 850*l.* which he was to pay, Mr. Horton on August 29 said, "I will run the boat for half profits till October 15, if you will let me have it on those terms." I am not prepared to say that the agreement to run her on half profits must impair or does impair the security. No doubt it prevents the boat for a period of six weeks from earning freight, unless that freight is produced by the profits; but I cannot say that under the circumstances there might not be an honest expectation that there would be profits. Therefore to undertake to run the boat at half profits seems to me not to be terms which must, under the circumstances, do any wrong to the rights of the mortgagee. Several other clauses of the charterparty have been referred to, but I need not go through them. If under clause 4 the charterer or the mortgagor were attempting to sell part of the equipment of the ship, as at present advised I do not think they would have any right to do so; but counsel for the defendant has asked us to say that because those words are used in the agreement it must impair the security. I cannot say that the existence of that clause, though it might impair the rights of the parties if a sale of the equipment of the ship had been attempted, makes the charterparty such that it is not binding upon the mortgagee, for it seems to me that the "effects" referred to in the clause would be wine or stores, and not part of the equipment. Then, again, certain expenses are to be paid out of the receipts. It may be a perfectly proper arrangement under the charterparty, although if under that the plaintiff seeks to set off something else, when taking those accounts the question would arise whether it could be brought into the account. Then the only other point is that the ship was not fully insured. I quite agree that the mortgagee has a right to prevent the vessel being run unless she is properly protected against perils of the sea; but it cannot be contended that if a charterparty is otherwise binding on the mortgagee, the fact that he could have restrained her from running until

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properly insured would justify him in setting aside a charterparty otherwise bonâ fide. Having regard to the judgment of Lord Westbury (1) and that of Lord Cairns in the House of Lords (2), I cannot find that this agreement was one to impair the security of the defendant, and, therefore, being entered into by the mortgagor under his powers as owner, as contemplated in s. 34 of the Merchant Shipping Act, it is binding on the mortgagee. He is entitled to take the benefit of it, but he is not entitled to treat it as of no effect.

A. L. SMITH M.R. and ROMER L.J. concurred.

Appeal and cross-appeal dismissed.

Solicitors for appellant (defendant) : *H. Forshaw & Hawkins, Liverpool.*

Solicitors for respondent (plaintiff) : *Wynne, Holme & Wynne, for Whitley & Co., Liverpool.*

(1) *Collins* v. *Lamport*, 34 L. J. (Ch.) 196.

(2) *Keith* v. *Burrows*, 2 App. Cas. 636.

T. L. M.

VALLENTINE *v.* VALLENTINE.

1901
June 7.

Divorce—Practice—Petition filed but not served—Application for Commission —Evidence de bene esse—Costs.

An order for a commission to take the evidence of witnesses out of the jurisdiction was made, at the risk and expense of the applicant, immediately after the petition had been filed and before there had been time to effect service.

Motion by petitioner (wife) for a commission to take the evidence of witnesses in Canada.

The motion was ex parte, the petition having been filed only that morning, and consequently not yet served on the husband.

The ground for urgency was that information had come to hand from Toronto to the effect that the evidence of certain persons then attending a criminal trial there would probably not be available in the present case unless it were taken before they left that city.

Barnard, for the petitioner, referred to *Brown* v. *Brown* (1), where the Judge Ordinary (Sir J. P. Wilde) gave leave to a petitioner, before service of the petition, to examine a witness who was about to leave this country for Australia.

Sir F. H. Jeune P. I cannot, at this stage of the proceedings, make any order against the husband in respect of the costs of the commission; but if the wife has means to defray the necessary expense, you may take an order for the commission, subject, of course, to any questions of admissibility of the evidence hereafter.

Solicitors: *Hood Barrs & Co.*

(1) (1864) 33 L. J. (P. & M.) 203.

H. D. G.

1901
May 23;
June 8.

A. (OTHERWISE B.) *v.* A. (THE KING'S PROCTOR INTERVENING).

Nullity—Decree Nisi—Intervention by King's Proctor—Motion by Petitioner to rescind Decree and dismiss Petition—Costs—Consent—Motion granted.

Upon the petitioner's application—the King's Proctor, who had intervened and filed his plea, assenting—the Court (Jeune P.) rescinded a decree nisi for nullity of marriage and dismissed the petition.

No order for the King's Proctor's costs was made, he having waived his right to ask for the same.

MOTION by petitioner to rescind decree nisi and dismiss petition.

The application was first made in the ordinary course on motion day (May 20) in open Court, and was then, after some argument, adjourned into Court, the learned President intimating that he wished to hear what the King's Proctor had to say as to it.

On May 23 the motion came on in camerâ.

Barnard, for the petitioner, read certain correspondence which had passed between the solicitors for the petitioner and the King's Proctor, in the course of which the case of *Joyce* v. *Joyce* (*the Queen's Proctor intervening*) (1) was referred to. [He cited *Halfen* (*otherwise Boddington*) v. *Boddington* (2) in support of the present application.]

THE PRESIDENT. That was an application by the respondent. I have been referred to *Gray* v. *Gray* (*the Queen's Proctor intervening*) (3) by Mr. Grazebrook, as amicus curiæ. Before deciding this case I should like to see what the King's Proctor alleges, and to have some information as to the grounds of his plea.

C. W. Mathews, for the King's Proctor.

Cur. adv. vult.

(1) (1864) 33 L. J. (P. & M.) 200. (2) (1881) 6 P. D. 13.
(3) (1861) 2 Sw. & Tr. 266.

1901

A. v. A.

June 8. THE PRESIDENT. I have felt the question in this case to be one of difficulty, because it involves the exercise on my part of a peculiar and responsible discretion. The petitioner claimed a decree of nullity on the ground of the non-consummation of the marriage, owing to her husband's incapacity. She made, of course, the usual affidavit that the proceedings were being taken without collusion. The husband filed an answer denying his incapacity, but he did not, at any stage, take any further part in the proceedings or submit himself for medical examination. The case came before me in camerâ on November 7, 1900.

I will not refer to the evidence further than to say that it appeared not only beyond question that the marriage never was consummated in fact, but also that no attempt had been made to consummate it, and that, indeed, the husband and wife never occupied the same bedroom. The case was a remarkable one, but there certainly was nothing to shew that the husband and wife had agreed that the marriage should not be consummated—indeed, there was evidence which appeared to negative such a supposition; and, acting upon the principles usually applied in such cases, I thought that it was my duty to hold that the allegation of incapacity on the part of the husband was made out, and decreed accordingly. The King's Proctor, acting under the directions of the Attorney-General, entered an appearance on April 30, 1901. A plea was prepared, alleging that divers material facts had not been brought before the Court, and that the petition was presented and prosecuted by the petitioner in collusion with the respondent; and it contained the usual prayer that the decree nisi should be rescinded, and the petition dismissed, and that the petitioner and respondent should be condemned in the costs of the King's Proctor.

But before this plea was filed—on May 3, 1901—the solicitors for the petitioner wrote to the King's Proctor that in March last the petitioner had written to them from abroad that she did not wish the decree nisi to be made absolute, and on her return to this country instructed them to apply to the Court to rescind the decree and dismiss the petition, and asked

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whether the King's Proctor would consent to such an application. In reply, the King's Proctor pointed out that after an appearance had been entered for the King's Proctor the Court had held that the intervention should proceed, in order that the King's Proctor might obtain an order for his costs, and added that, if an undertaking were given that the costs of intervention would be paid by the petitioner, he would be prepared to withdraw his appearance and consent to the petitioner's application. The solicitors for the petitioner, in reply, emphatically denied the truth of the charges made, entirely declined to pay any costs of intervention, and added that if the consent of the King's Proctor were withheld the matter would have to be fought out in the usual way.

After some further correspondence, the King's Proctor, acting under the direction of the Attorney-General, communicated his willingness to withdraw his appearance without making any demand for costs. Application was accordingly made to me on behalf of the petitioner to rescind the decree nisi and dismiss the petition. I desired to be informed of all the circumstances before deciding what course I ought to pursue, and for this purpose counsel for the petitioner and the King's Proctor attended before me in camerâ. The matter was fully laid before me, and the King's Proctor most properly conveyed an intimation from the Attorney-General that he was willing that the matter should be left in my hands. The difficulty I felt was this: I could not shut my eyes to the fact that it was alleged, and I will only say alleged, on ground which the Attorney-General must have considered—primâ facie at least—of weight, that the parties had agreed that the marriage should not be consummated, and had nevertheless collusively come before me and endeavoured successfully to obtain a decree on the ground of the husband's incapacity. This of course involved a false statement by the petitioner—who has sworn that there was no collusion—as well as an abuse of the process of the Court by both parties acting in collusion. I had therefore to ask myself whether I should, when so serious a charge remained unanswered, give any assistance to either party to avoid further investigation of the

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matter. Of course it is always within the power of a petitioner to abstain from proceeding, and, after a plea by the King's Proctor has been filed, the petitioner could—and petitioners often do—tacitly admit the truth of the plea and agree to the petition being dismissed. But it is another thing for the Court to appear in any way willing to prevent investigation and acquiesce in the abuse of its process by giving the kind of sanction to the petitioner's conduct implied in allowing the petition to be dismissed; and I must say that my first inclination was to refuse to dismiss the petition, and leave the parties and the King's Proctor to take whatever course they might be advised. But on the whole I think I need not adopt this course. In one sense it would, or might, be futile, because I cannot compel the petitioner to make her decree nisi absolute. In all probability the King's Proctor would, in such case, think it right to proceed with his intervention; but then the only result would be that if the case went through all its stages, and his plea were proved, the petition would be dismissed; or, if after the plea was filed the petitioner refused to contest it, the same result would follow. The only difference, therefore, would be that the petitioner would, by proof or practical admission, be convicted of collusion. But the more I have thought over the case, the less does even this difference appear to me to amount to. I do not wish to express any doubt that the desire of the petitioner to withdraw from this suit was formed, and to some extent carried out, antecedently to any knowledge of intervention by the King's Proctor. But there remains the fact that the charge of collusion has been formally made, and that the petitioner still desires, I do not say to evade, but to avoid, investigation of it; and the difference between the position of a person who determines not to contest a plea pleaded, from one who continues in a desire to withdraw from a suit after intimation has been given that such a plea will be pleaded, appears to me infinitesimal. I should have supposed that a petitioner, conscious that the charge made by the King's Proctor was unfounded, would, whatever his or her previous intention might have been, have declined to withdraw from the suit until the charge was withdrawn or investigated. I do not

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think, therefore, that the present case differs materially from the common case of a party who seeks to withdraw his or her petition rather than meet the plea of the King's Proctor; and I think that I may take the course usual in such cases and allow the decree nisi to be rescinded and the petition dismissed. I will only add, as regards the question of costs which was raised by the King's Proctor, that I think the view expressed by him as to the practice of the Court was perfectly correct. If he insisted on it, the authorities shew that the Court would not allow the petition to be dismissed without his costs being provided for. But if, in any case, the King's Proctor chooses to waive his claim for costs, I should be very slow to question —and certainly in this case I do not question—the propriety of his so acting.

Solicitors for the petitioner: *Lewis & Lewis. The King's Proctor.*

H. D. G.

[IN THE COURT OF APPEAL.]

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1901
May 15.

THE CAMPANIA.

Admiralty—Collision—Fog—"Moderate Speed"—Regulations for Preventing Collisions at Sea, 1897, *art.* 16.

A large twin-screw mail and passenger steam vessel was proceeding up the St. George's Channel in a dense fog at 9 to 10 knots an hour—her full speed being 21 knots—when she sighted a barque about 150 feet ahead, and, in spite of efforts to avoid her, struck her amidships, cutting her in two, with the loss of eleven lives. It was contended on behalf of the owners of the steam vessel that the speed at which she was travelling was moderate in the existing circumstances and conditions, as that speed was the lowest at which she could be readily manœuvred so as to avoid other vessels, and unless she was kept steaming continuously at about that speed, she could not be navigated with safety to herself as there would be danger from uncertainty both in respect of her course and position:—

Held, by the Court of Appeal (Lord Alverstone C.J., A. L. Smith M.R., and Romer L.J.), affirming the decision of Gorell Barnes J., that the speed was not "moderate" within the meaning of art. 16 of the Regulations of 1897 for preventing collisions at sea, as the terms of that article are imperative, and, as a general rule, speed such that another vessel cannot, after being seen, be avoided, is excessive. If a steam vessel cannot in a fog be continuously navigated at a very slow speed she must, in order to comply with the rule, and in the absence of exceptional dangers of navigation such as may arise from narrow waters or current, be stopped from time to time so as to take off her way. This may involve some inconvenience in the shape of delay, and possibly render it necessary to haul out from the coast, besides requiring proper steps to be taken to verify the position of the vessel, but it gives more opportunity of hearing the sound signals of an approaching vessel, more time to act when necessary, and, if a collision should occur, the consequences are less disastrous.

APPEAL by defendants, the owners of the *Campania*, against a decision of Gorell Barnes J., pronouncing their vessel alone to blame for a collision with the *Embleton* owned by the plaintiffs.

The question was: what, in the case of a large and fast ocean steam vessel, is "moderate speed in a fog" within the meaning of art. 16 of the Regulations of 1897 for preventing collisions at sea. (1)

(1) Art. 16: "Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

"A steam vessel hearing, apparently

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[The facts and arguments fully appear in the considered judgment of the learned judge in the Court below. Besides the cases mentioned therein, the following were referred to: *The Pennsylvania* (1), quoting a passage from the judgment of the Privy Council in *The Europa* (2); *The Martello.* (3)]

1900. Nov. 20. GORELL BARNES J. This cases arises out of a disastrous collision, which occurred about half-past eight on the morning of July 21 about twenty-six miles N.E. of the Tuskar, between the barque *Embleton* and the SS. *Campania*, resulting in the total loss of the *Embleton*, and the loss of the lives of eleven of her crew.

The *Embleton* was a barque of 1196 tons register, and at the time of the collision was proceeding down St. George's Channel, on a voyage from Liverpool to New Zealand, laden with a general cargo, and manned by a crew of eighteen hands all told.

The *Campania* is a twin-screw steamship of 12,950 tons gross and 4974 tons net register. She was bound from New York to Liverpool with a large number of passengers, mails, and general cargo, and manned by a crew of 417 hands all told.

The weather at the time was a dense fog. The barque was sailing close hauled on the starboard tack under reduced sail, heading about S. ½ E. by compass, or about S.S.E. true, making about 2 knots an hour through the water, and her witnesses stated that her fog-horn was being regularly sounded one blast in accordance with the regulations. According to the account of these witnesses, the whistle of the *Campania* was heard a long way off, broad on the starboard bow, and each time it was heard it was answered by the fog-horn. The *Embleton* was kept on her course, and the *Campania* drew nearer until she came into sight, distant about half the length of the barque, right abeam, and almost instantaneously struck

forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

(1) (1873) 19 Wall. 125, at p. 134.

(2) Dec. 6, 1851. See Pritch. Ad. Dig. vol. i. p. 223, Nos. 338, 339.

(3) (1888) 34 Fed. Rep. 71.

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the barque nearly at right angles, went right through her, and sank her, the master and ten of her crew being drowned, while the rest were saved by the boats of the *Campania*.

The steamer's witnesses stated that she was proceeding with her engines working at slow, making between 9 and 10 knots an hour, on a course of N. 35° E. true. Her whistle was being automatically sounded a long blast every minute. Her master, Captain Walker, who has been in the Cunard service for thirty-three years, and has crossed the Atlantic 124 times in her without any previous accident, was on the bridge with the first officer and extra second officer. There was an A.B. on the look-out in the crow's-nest on the foremast who had been at sea for seven or eight years, and had made three voyages in the *Campania*, and a man on the forecastle head who had been shipped through the shipping office for seamen in New York, but had not been at sea before, though Captain Walker stated that the shipping office guarantees to the company that the men shipped are seamen or firemen, as required. While thus proceeding, those on board the *Campania* made out the loom of the barque about 150 feet from the steamer's bows. The look-out man reported her, and she was seen almost at the same time from the bridge. The engines were at once reversed full speed astern, and the helm put hard-a-starboard, but the collision happened almost immediately. The boats of the *Campania* were in the water in less than three minutes, and those of the barque's crew who were rescued were picked up by them. No sound of the barque's fog-horn was heard by any one on board the *Campania*, neither before nor after the barque came in sight, though the witnesses for the barque stated that it was being regularly sounded, and that from the moment of the *Campania* coming into sight it was sounded continuously.

The only charge made by the defendants against the barque was that the fog-horn was either not being sounded at all, or not efficiently sounded. The fog-horn on the barque was a mechanical fog-horn of the kind known as "Norwegian" fog-horns. One similar to it was produced in court. It had been surveyed and passed in London about November, 1898, by

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Captain Rice, Board of Trade Surveyor, and appears from the evidence to have been kept in, and to have been at the time of the collision in, good working order. The Elder Brethren advise me that this class of fog-horn is efficient, as required by art. 15 of the Regulations for Preventing Collisions at Sea, 1897.

I find that there was nothing the matter with the fog-horn; and further, after seeing the plaintiffs' witnesses and hearing their evidence, I am satisfied that it was being duly and properly sounded, as required by the regulations. It is said by the defendants that this cannot have been the case, because no one on the *Campania* heard it, though those on duty on board her were fully on the alert. But the fact that the sound of the fog-horn does not appear to have reached the ears of those on board the *Campania* is not sufficient to override the positive evidence of the witnesses from the barque that it was being properly sounded. The Elder Brethren advise me that as a matter of experience sound signals in a fog are not always to be heard as they might be expected to be, and especially by persons on steamers approaching at considerable speed, and sounding their own fog whistles, and that this makes it all the more necessary that the speed of vessels in a fog should be moderate as provided by art. 16.

I am of opinion that the *Embleton* is not to blame for this collision.

The case made against the *Campania* is that she was guilty of a breach of art. 16 in that her speed was excessive in the circumstances. No other point was suggested against her, and I think it is clear that apart from this question of speed, no precautions were neglected on board her to ensure the safety of the large number of persons and valuable property entrusted to the care of her experienced commander. Article 16 is one of the regulations for preventing collisions at sea which apply everywhere at sea to British vessels and the vessels of all the principal maritime nations. The article is as follows. [The learned judge read the article already set out, and continued:—]

What is a moderate speed depends on the existing circumstances and conditions in each case. In this case the fog was

very dense, and there is no dispute about the speed of the *Campania*. It is put in the pleading by the defendants at from 9 to 10 knots. Captain Walker said that calculated from the revolutions of the engines the speed worked out at 9·23 knots. It seems to have been somewhere between 9 and 10 knots at the time. The engines were working at slow. The contention on the part of the defendants was that for the *Campania* this speed was a moderate speed in the existing circumstances and conditions.

The evidence of Captain Watson, the general superintendent of the company, and Captain Walker was to the effect that at sea the *Campania* could not be safely navigated at less speed, for that if she were she would not steer properly, and there would be uncertainty about her course and the distance run, and further, that being a twin-screw steamer she could be brought to a standstill in a very short distance by reversing her engines full speed astern.

Three methods of reducing her speed still further were suggested by the plaintiffs. First, that she could be worked with one engine. To which it was answered that in that case her helm would have to be kept hard over against the screw which was working, and that she could only keep her course then with the engine working full speed, which would give her about 13 or 14 knots an hour, and that if the one engine were worked slowly her course could not be relied on. Secondly, that her vacuum could be cut off in a manner explained by the witnesses, and stated to be done when she is engaged in docking. To this it was said that it would not be practicable at sea, as it would prevent her from properly reversing her engines in an emergency, and her steering would be affected if her speed were below 9 knots. Thirdly, that she could work her engines at slow, and stop from time to time, so that her speed could be kept down to a very low rate. The objection made to this course was that in a run of any distance in a fog, for instance, from the Tuskar to the Skerries, where she would be crossing the tide, it would not be possible to ascertain with reasonable certainty the distance the vessel had run nor the course which she had actually made, and that

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therefore her safety and that of those on board of her would be imperilled.

I do not think it is necessary to criticise the first two suggestions and the objections thereto. The third is sufficient for the purposes of my judgment. Moreover, it is one of general application, and has formed the subject of consideration in previous decided cases.

In the case of *The Irrawaddy*, tried in Admiralty, June 15, 1887, and to be found in the *Shipping Gazette* for that year, a collision occurred in the Channel between the Mull of Galloway and Port Patrick in a thick fog. This vessel was going at 6·5 knots an hour, and was condemned under the rule which corresponded with the present 16th article. Lord Hannen, in the course of his judgment, said :—

"I should add that, so far as I am able to form an opinion on this matter, it seems to me quite untenable to argue that a vessel is justified in going at the lowest rate she is constructed to go at if that is not a moderate speed. It appears to me that if a vessel is so constructed that she cannot go at a moderate pace she must take the consequences. I quite accept the view that there is great difficulty in dealing with a vessel by checking her speed from time to time—that is, by stopping and taking the way off her—and that it has a tendency to throw a vessel out of her course, and leads to difficulties. But I have to deal with the matter as a lawyer, and I have to say what is a moderate speed; and I say if it be necessary to reduce the speed of a vessel below that which is its lowest speed, though it may cause inconvenience, yet it must be done in what appears to me to be the only practicable way of doing it, namely, by stopping from time to time."

Again, in the case of *The Resolution* (1), the *Sesostris*, going against a 2½-knot current in the Straits of Gibraltar, at a speed of 5 knots an hour in a dense fog, was held to blame for excessive speed by Sir Charles Butt, who made the following remarks in part of his judgment :—

"I know it is said, and nearly always said in these cases, that large steamers cannot go below a certain rate, because,

(1) (1889) 6 Asp. M. L. C. 363.

apart from the question of steerage way, the revolutions would be so slow that the engines would stop on the centre . . . . But if a vessel cannot reduce her speed sufficiently with the continuous action of her engines, and therefore cannot go at what would be a reasonable speed in a fog without occasionally stopping her engines, it is her duty to occasionally stop them. Masters can always carry out the manœuvre in that way, and I will not yield to what I know is the strong disinclination of the masters of these large vessels to stop their engines. They hate and abhor the very idea; but it is, to my mind, their duty to do so if they cannot otherwise reduce their speed sufficiently."

The following observations, made by Lord Romilly in delivering the judgment of the Privy Council in the case of *The Pennsylvania* (1), where a collision occurred about 200 miles east of Sandy Hook between a barque and the steamship *Pennsylvania*, which was going at 7 knots an hour in a thick fog, whose master alleged that no less a speed than that would have enabled him to keep the vessel under command—are also in point:—

"Their Lordships do not mean to lay down what rate of speed would have been proper under these particular circumstances. In some cases 4 knots an hour, and in another 3½ knots an hour, have been held to be an improper rate of speed; it always must have reference to the peculiar circumstances of the case. But their Lordships are of opinion that in a thick fog in the Atlantic Ocean, in the direct line to New York, about 200 miles to the east of Sandy Hook, where frequently there must be a great number of vessels congregated, 7 knots an hour is too great a speed for a steamer to proceed at. It was argued that if their Lordships held that 7 knots an hour was too great a speed at which to proceed in a thick fog in that position, it would paralyse all the efforts of mercantile transactions, and that neither passengers nor goods could be properly conveyed across the Atlantic with a due regard to business and trade.

"Their Lordships do not concur in that argument, and are

(1) (1870) 3 Mar. Law Cases (O.S.) 477.

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of opinion that the lives of passengers and the safety of goods must be protected in the first place.

"Their Lordships are of opinion that, even if these fogs should last longer than they are said to do, still the steamers must abate their speed, and that if they do not they must take all the consequences of a collision."

I have expressed myself much to the same effect in the case of *The Germanic*. (1)

Now, the Elder Brethren are of opinion, and I agree with them, that a speed of 9 knots an hour in such a fog as that which prevailed on the present occasion is a greatly excessive speed for any steamer to proceed at. At such a speed it is practically impossible to take effective steps to avoid doing damage to another vessel after she is seen only 150 feet off ahead, and as a general rule, speed, such that another vessel cannot be avoided after being seen, is excessive: see *The City of Brooklyn*. (2)

The impact of a steamer, especially a large one, proceeding at a speed of anything approaching 9 knots an hour upon another vessel is terrible. In the present case the *Campania* went right through the barque, cutting her in two, although the barque was fully laden, and part of the cargo consisted of pig iron and bar iron and felt stowed in the part where she was struck.

The advantages to be gained by a very slow speed, as compared with greater speed, are clear. One of the most important is that those on board a vessel proceeding at very slow speed have more opportunities, while traversing a given space, of hearing the sound signals of an approaching vessel than if their vessel were going faster. For instance, if a steamer proceeding at 10 knots an hour had half a knot to traverse before reaching the spot where her course and that of an approaching sailing vessel would intersect, those on board of her would only have the chance of hearing about three sound signals from the sailing vessel, for the steamer would cover the half-knot in three minutes, and the sound signals on the sailing vessel ought to be given at intervals of not more than

(1) The Times, Feb. 22, 1896. (2) (1876) 1 P. D. 276.

one minute. If, however, the steamer were only proceeding at 5 knots an hour, those on board her would have the chance of hearing six sound signals while covering the half-knot distance. Moreover, it is obvious that at the slower speed more time is given to act for an approaching vessel when her signals are heard or she is seen, and that the way of a steamer is much more quickly taken off by reversing when she is going at slow than at fast speed, and even if a collision is not averted, its consequences may be much less disastrous if the speed is very slow. The greater proportion of ordinary cargo boats, probably most of them, cannot attain a greater speed than from 9 to 10 knots when going at full speed. Such a steamer would be condemned for excessive speed if she ran at full speed into a vessel in a dense fog. These vessels, by working their engines at slow, can usually reduce their speed to about 3 knots an hour without any difficulty.

The contention for the defendants comes to this, that as their vessel cannot, as they allege, go with safety when navigating at less speed than about 9 knots an hour, she is justified in keeping on at that speed in a dense fog. Possibly a similar contention could be made on behalf of a considerable number of the large and fast passenger boats of the day.

Article 16 is imperative, and I believe it would be most dangerous, having regard to the traffic to be met with everywhere, especially near the coasts in crowded waters, if this contention were to be upheld. It is based on the supposed necessity for the *Campania* to keep the speed at which she was going for the safety of her own navigation; but I am advised that this basis is unsound. Captain Watson himself stated that a fog may be so dense that it is not possible to see across the ship, and that in that case she would probably have to stop her engines. A special signal is provided by art. 15B for such a case. The vessel's position afterwards would have to be ascertained by estimation and soundings, if possible. If the fog be not so dense as to require the vessel to stop, she can go at a moderate speed within the rules by going slowly ahead, and stopping her engines from time to time.

The objection to this by the defendants is that she cannot

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then steer properly and ensure a good course, and certainty as to the distance run; but the Elder Brethren advise me that unless there is something exceptional in the circumstances all that this might involve would be delay and the taking of proper precautions to haul out from the coast, if approaching it, and for verifying her position, and that there was nothing in the circumstances or conditions of the present case to prevent the *Campania* from proceeding in this manner and yet keeping sufficient steerage way.

The Court fully appreciates the anxiety of the defendants to ensure the safety of their vessels, passengers, and crews, and the desirability of completing the voyages without unnecessary delay; but the risks of collision between their vessels and others which they may meet with on their passages can be best averted by strict adherence to the Regulations for Preventing Collisions at Sea, even though this may cause some inconvenience. Other dangers of the navigation can be guarded against by proper precautions, even though there may be some delay caused by carrying them out.

I am of opinion that the *Campania* was guilty of a breach of art. 16, and must be held solely to blame for the collision.

On appeal:—

1901. May 15. *Pickford, K.C., Aspinall, K.C.*, and *Lauriston Batten*, for the appellants (defendants), the owners of the *Campania*. In the Court below the *Campania* was pronounced to blame for excessive speed in fog; but the learned judge does not suggest that the speed complained of was the result of negligence in the navigation of the vessel, and the evidence shews that it was deliberately maintained by an experienced navigator as best and safest. The speed in knots which art. 16 allows has not been defined, and it is submitted that the speed was "moderate" within the meaning of that article, for what is "moderate speed" is a nautical question depending, in the words of the article, on "the existing circumstances and conditions." These words have been intentionally inserted in order to give more latitude than was allowed by art. 13 of the rules of 1884, under which the cases relied on by the respond-

ents were decided. The old rules were framed to suit a type of vessel now fast disappearing—that is to say, vessels not fitted with twin screws, and not provided with those improved mechanical appliances by means of which the engine-room staff can instantly carry out the orders telegraphed to them from the bridge. The question, therefore, resolves itself into an inquiry at what rate of speed should the *Campania* be navigated in fog in order to insure the maximum of safety to herself and other vessels, for it may be that, in view of the great size and momentum of the class of vessel to which she belongs, the risks of navigation have been increased, but that will not render unlawful the employment of vessels adapted to the necessities of modern traffic. The evidence is that if the *Campania* steams at a less speed than 9 knots she would be a danger to other vessels, for she would not readily answer her helm. She, therefore, not being under complete control, could not promptly manœuvre when such action might be necessary. Secondly, it is urged against the appellants that the vessel should be stopped from time to time; but her own safety would be thereby imperilled, for in a tide way her position would alter without any means being available of verifying that position. If her engines are not going continuously the number of revolutions do not afford any correct record, and, assuming that the circumstances render it practicable to take soundings, these would not give any certain data as, according to the evidence, the readings of the log, on account of the vessel having stopped, would be fallacious, and, therefore, the course and distance run between the casts would not be accurately known. It must also be borne in mind that, owing to her power of rapidly reversing, the *Campania* can, in an emergency, when going ahead at 9 knots, be brought to a standstill in about a length and a half.

The argument that, if the vessel goes slower, a longer interval will elapse in which fog signals may be heard, does not apply in this case, as no sound signals were heard from the *Embleton* at all, though it is an admitted fact that those in charge of the *Campania* were on the alert. It may be that the fog-horns of sailing vessels are not efficient instruments for

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the purpose for which they are intended, and that this was the real cause of the collision.

Joseph Walton, K.C., Laing, K.C., and *Alexander D. Bateson,* for the respondents—the owners of the *Embleton,* and members of her crew claiming for their lost effects—were not called upon.

LORD ALVERSTONE C.J. We agree with the reasons given in the very careful judgment of Gorell Barnes J., and that would be sufficient for the judgment of this Court; but, having regard to the arguments that have been addressed to us by counsel for the appellants and the importance of the case from a commercial point of view, I think it right to briefly refer to the objections which have been raised to the judgment.

Gorell Barnes J. has found, with the entire concurrence of the Elder Brethren of the Trinity House, that this vessel, the *Campania,* was disobeying art. 16, and, therefore, is to blame. The nautical assessors who assist us tell us that they agree with the Elder Brethren.

The collision happened 26 miles N.E. of the Tuskar, and early in the day, in a position where the Elder Brethren have thought, and on the facts it is really not disputed, that vessels, navigating in the opposite direction, would be liable to be met. The *Campania,* which has an ordinary full speed of 21 knots, was steaming uniformly—that is to say, continuously, before and at the time of the collision, at a speed of a little over 9 knots—9·23—roughly between 9 and 10 knots an hour. The weather was such that vessels could only be seen at a distance of possibly the ship's length, about 600 feet. The distance at which the other vessel was actually seen was 150 feet. The *Campania* is a twin-screw vessel, and it is said that she is best under command at about 9 knots—that is to say, a speed of not less than 9 knots—and that at less than that speed she does not steer so well, and possibly, I think, steers badly.

It is very important to consider one fact pointed out in the judgment of Gorell Barnes J., namely, that from 9 to 10 knots is the full speed of a very large proportion of the cargo steamers navigating the seas, and if we are to have different

rules for vessels which have a higher ordinary speed, the authority, that is, the Legislature, should lay it down, and the Court should not impose a less responsibility upon a ship that is going at that speed unless the circumstances are such as to shew that there has been no breach of the rule.

The reasons why those in charge of the *Campania* say she must go, and was right in going, at over 9 knots are, first, that she might otherwise lose her reckoning; in other words, she might either overrun her log or not know by mere observation, counting the number of revolutions, what distance she had gone. It is common knowledge that vessels do partly calculate their speed and ascertain their position by the number of revolutions of their engines when they are running without interruption. As to that, I would call attention to what Gorell Barnes J. was advised on the point. He says in his judgment: "But the Elder Brethren advise me that unless there is something exceptional in the circumstances, all that this might involve would be delay and the taking of proper precautions to haul out from the coast, if approaching it, and for verifying her position." So far as losing her position is concerned, it had occurred to my mind before I noticed the advice given to Gorell Barnes J. by his assessors that although it might involve delay and difficulty, it cannot be a sufficient reason to justify a higher rate of speed, or a speed which we think would be a breach of the rules. Secondly, it is said that the *Campania* manœuvres best at 9 knots, and assuming there is risk of something coming into her, she is handier at 9 knots. As to that the learned judge, having adopted the view adopted over and over again in the Admiralty Court, and laid down in its judgments, that vessels in such a position ought to stop from time to time and listen—that is to say, feel their way, as I remember Lord Esher and Butt J. saying—the learned judge in the Court below is advised as follows: "The objection to this by the defendants is that she cannot then steer properly and ensure a good course and certainty as to the distance run; but the Elder Brethren advise me . . . . there was nothing in the circumstances or conditions of the present case to prevent the *Campania* from

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proceeding in this manner and yet keeping sufficient steerage way." Therefore, if we are to accept the arguments of counsel for the appellants we must on some ground of law go against that advice given in the Court below and concurred in by our assessors and many most distinguished judges.

To my mind in these collision cases the facility in handling these large steamers is by no means the only important consideration. One of the most important considerations is how soon the way can be taken off a very large ship. I do not rely upon the circumstances of this particular case so much, though it is very striking that a ship should cut through a barque of 1100 tons, laden with iron, and sink her in a very few minutes, with the loss of eleven of her crew; but I rely upon the experience of the Courts, that where there is this enormous momentum the consequence of 9 or 10 knots speed, you must take it off by reversing, and I think that facility in taking off way quickly and reducing to a position of comparative rest is not only of great importance so as to avoid collision, but also in avoiding the serious consequences of it. I think that consideration must have affected the framers of the rule and the judges in construing it, in dealing with questions of speed.

In the next place, speaking for myself, I must say that I think the Court below considered that vessels which are going at 9 or 10 knots without stopping and, therefore, without doing that very thing which learned judges have pointed out ought to be done, do not give themselves the same opportunity of hearing sounds, for it is common knowledge that fog-horns and other sounds are not so easily transmitted in abnormal conditions of weather.

I see no ground for differing from the views of the learned judge, and in my opinion it is of great importance that persons who have this very great responsibility, both to their own ship and to other ships, should not act contrary to the rule which has been so often enforced, unless there is paramount necessity. I do not say that there may not be cases in which under the rule it would be justifiable to go at a higher rate of speed than would under other circumstances be thought to be moderate.

I can imagine that even in a fog, owing to danger, either from narrow channels or currents, it might be necessary for the safety of the ship to go at a higher speed. This is not one of those cases. It is a case out in St. George's Channel, where, speaking generally, there is ample sea room, but where there is danger from other vessels which are likely to be coming down to the Tuskar.

I have, perhaps, said more in this case than was necessary, because I see no reason to differ from the very carefully considered judgment of the learned judge, and I think we could not upon any ground of law, and certainly not of fact, hold that the speed at which the *Campania* was going was, within the terms of art. 16, "moderate," having regard to the existing circumstances and conditions.

A. L. SMITH M.R. and ROMER L.J. concurred.

Appeal dismissed.

Solicitors for appellants (defendants): *Hill, Dickinson, Dickinson & Hill, Liverpool.*

Solicitors for respondents (plaintiffs): *Batesons, Warr & Wimshurst, Liverpool.*

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Admiralty—Salvage—Damage by Ship to Landing-stage—Competing Maritime Liens—Insufficient Proceeds—Priorities.

A foreign steam vessel, with engines broken down, after being safely towed into the Mersey by salvors, was run into by another vessel, and, to prevent her sinking in deep water, second salvors endeavoured to beach her, with the result that she came in contact with, and damaged, a landing-stage belonging to the Mersey Dock Board. As a wreck obstructing the navigation, the Board, under their statutory powers, took possession of her, raised, and sold her, paying the net proceeds into court after deducting expenses. The proceeds were insufficient to meet the claims of the two salvors and the claim of the Dock Board for the damage done to the landing-stage.

On the question of priorities:—

Held, by Gorell Barnes J., that the claim of the Dock Board came first, then that of the second salvors, and lastly that of the first salvors, for—as between the Dock Board and the salvors—the Board had a maritime lien for the damage done, and, whether the Board had a maritime lien or not, the right of the Board to proceed in rem overrode the prior lien of the salvors, as being based on a claim against the wrong-doing vessel ex delicto, involving no option in the sufferer, whereas the salvors in voluntarily undertaking to render services incurred the risk of subsequent claims attaching. Secondly, as between the two salvors, the ordinary rule applied giving the claim of the second salvors precedence, on the ground that their exertions tended to preserve the res for the benefit of earlier claimants.

Motions by a damage claimant, and two salvors, for the determination of priorities in respect of a sum of 927*l.* 5*s.* 2*d.*, the proceeds in court of the Norwegian steam vessel *Veritas*.

The case is reported on the question whether damage, done by a ship to a landing-stage within the body of a county, gives rise to a maritime lien, and whether a claim for such damage takes precedence of the claims of prior salvors.

The facts and arguments fully appear from the judgment.

July 15, 16. *Aspinall, K.C.*, and *Maurice Hill*, for the Mersey Docks and Harbour Board, damage claimants.

Carver, K.C., and *Lauriston Batten*, for the owners, masters, and crews of the tugs *Prairie Cock* and *Sea Cock*, salvors.

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Bailhache and *Glynn*, for the owners, master, and crew of the steam vessel *Caledonian*, salvors.

[In addition to the cases and statutes mentioned in the judgment, the following were referred to. By counsel for the Mersey Docks Board: *The Chioggia* (1); *The Immacolata Concezione* (2); *The Robert Pow* (3); *The Mary Ann* (4); *The Vera Cruz* (5); *The Madonna d'Idra* (6); *The Selina* (7); Kennedy on Salvage, p. 7. By counsel for the tugs: *The Gustaf* (8); *The Linda Flor.* (9) By counsel for the *Caledonian*: *The Ripon.* (10)]

Cur. adv. vult.

July 29. GORELL BARNES J. There are three motions in this case for payment out of court of certain sums out of the proceeds of the *Veritas* now in court. The motions are made under the following circumstances: In October last year the *Veritas*, a Norwegian steam vessel, laden with a cargo of ice for Liverpool, was in distress outside the Mersey, and salvage services were rendered to her by the steamship *Caledonian*, by which she was brought into and anchored in the Mersey. The services of the tug *Prairie Cock* were then engaged, and while that tug was fast to the *Veritas* a collision occurred between the *Veritas* and the steamship *Devonian*, in consequence of which the *Veritas* began to fill, and salvage services were rendered to her by the tugs *Prairie Cock* and *Sea Cock*, with the result that she was brought to a place alongside the dock wall to the south of the Liverpool landing-stage. From this place she drifted against the stage, doing damage to the boom and other connections of the stage, and sank, and her cargo of ice perished. She was removed by the Mersey Docks and Harbour Board under the powers conferred upon them by s. 11 of their Act of 1874 as amended

(1) [1898] P. 1.
(2) (1883) 8 P. D. 34.
(3) (1863) Br. & L. 99.
(4) (1865) L. R. 1 A. & E. 8.
(5) (1884) 9 P. D. 96, at p. 99; 10 App. Cas. 59.
(6) (1811) 1 Dods. 37.
(7) (1842) 2 Notes of Cases, 18.
(8) (1862) Lush. 506.
(9) (1857) Swa. 309.
(10) (1885) 10 P. D. 65.

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by s. 29 of their Act of 1889. The Board had also the right to detain her in respect of the damage under s. 94 of their Act of 1858.

On October 15 an action was instituted in this Court by the owners, masters, and crews of the tugs against the *Veritas* in respect of the salvage services rendered by them, and on the same day she was arrested in that action. The Board intervened in that suit, and on October 19 an order was made by consent for the release of the *Veritas*, the interveners undertaking to furnish the plaintiffs with an account of receipts and expenditure in dealing with the wreck under their statutory powers and to lodge the overplus in court to the credit of the action to abide further order, without prejudice to liens, rights, or priorities of any claimants on the *Veritas* or proceeds of sale. The vessel was accordingly released, and on October 23 sold by the Board, and, after deducting the expenses of the Board, the net proceeds amounted to the sum of 927*l.* 5*s.* 2*d.*, which was brought into court to the credit of the salvage action.

On November 23 an action was instituted in this Court against the proceeds of the *Veritas* by the owners, master, and crew of the *Caledonian* in respect of the salvage services rendered by them, and on December 7 a caveat against the payment out of court of the proceeds was entered in the first action on behalf of the last plaintiffs, who afterwards intervened in the first action, though not until after judgment was obtained in it. On January 14, 1901, judgment was obtained by the plaintiffs in the action in respect of the salvage by the *Prairie Cock* and *Sea Cock* in the sum of 320*l.* and costs, without prejudice to claims on the fund in court, and reserving all questions of priorities. On April 29 judgment was given for the plaintiffs in the action in respect of the salvage by the *Caledonian* for 400*l.* and costs, all questions of priorities being reserved. On February 8, 1901, an action was instituted in this Court by the Mersey Docks and Harbour Board against the proceeds in respect of the damage done to the landing-stage, in which the plaintiffs in the two salvage actions intervened, and on July 1 judgment was given for the plaintiffs for 600*l.* and costs, all questions of priorities being reserved. The

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owners of the *Prairie Cock* and *Sea Cock* appeared at the hearing. By their defence as interveners they had raised, inter alia, the question of whether or not the damage sustained by the Board was due to the negligence of those on board the *Veritas*, and the judgment appears to have proceeded on the ground of such negligence being found by the Court, and no point was raised before me that this was not so. By the formal decree the Court pronounced the collision to have been occasioned by the fault or default of the master and crew of the *Veritas*, and condemned the defendants, the owners of the *Veritas*, in 600*l.* and costs. It is to be observed that all these judgments were conditional, and as the funds are still in court the claims have to be dealt with on their respective rights to priority: see *The Africano*. (1) A collision action was also tried between the *Devonian* and the *Veritas*, in which the *Devonian* was, on February 7, 1901, held to blame for a bad look-out, and the *Veritas* also to blame on the ground that the tug *Prairie Cock*, while alongside of her, was exhibiting only under-way lights and had not a second masthead light for towing. (2)

The Board claims to have a maritime lien on the proceeds for their damage and to take priority over the salvors. This claim is disputed by both salvors. The *Prairie Cock* and *Sea Cock* claim to have priority over the damage claim and over the claim of the prior salvors. The first salvors claim to have precedence over the second and dispute the right of the second to claim salvage in the circumstances. These rival claims give rise to some questions of general importance and considerable difficulty, which were well argued by counsel before me.

The first question to determine is with regard to the claim of the Board. It was first urged by the salvors that the Board had waived any right against the *Veritas* and the proceeds by selling the *Veritas* under the powers conferred by their Acts. This point was principally made by the *Prairie Cock* and *Sea Cock*, who were parties to the consent order, though the owners of the *Veritas* and the *Caledonian* were not. The answer to

(1) [1894] P. 141. (2) Reported on appeal [1901] P. 221.

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the point appears to be that the Board has recovered judgment against the proceeds in their action to which both sets of salvors had become parties by intervening, and that the judgment is binding and conclusive, at any rate so far as it establishes a right on the part of the Board to proceed for their damage against the proceeds: see as to the effect of such a judgment, *Ballantyne* v. *Mackinnon*. (1) Every possible point appears to have been raised in the defence put in on behalf of the tugs, but in their rejoinder these interveners withdrew their defence except as to the question of priorities, and stated that they were willing that the Board should have judgment for 600*l*. against the proceeds. The judgment reserved the question of priorities. Further, as shewing that the Board had not waived any right it may have to proceed against the fund, it is to be observed that in selling under its statutory powers the Board do not extinguish the claimants' claims altogether against the proceeds, but hold the same subject to such rights as could be enforced against the res. By s. 11 of the above-mentioned Act of 1874 they are to render the overplus (if any) to the person or persons entitled to the same. This sale would not affect such rights as the salvors have against the proceeds, and there seems to me to be nothing inconsistent in the Board also being allowed to enforce by proceedings against the proceeds any rights which they may have in respect of damage done by the *Veritas* to their property, and, although they had an option to detain the wreck until their damage was paid or a deposit made for the same, that appears to be only an additional right, and if not exercised that does not prevent the Board from enforcing by action any claim they may have to recover for the damage done to the stage and its connections. The case of *Barraclough* v. *Brown* (2), which was cited, does not in my opinion apply. That case was dealing with a liability only imposed by the Act referred to in the case.

The second point raised by the salvors was that the Board had not a maritime lien for their damage. That the Board had a right to proceed in rem under s. 7 of the Admiralty Court Act, 1861, is clear, and the judgment in favour of the Board

(1) [1896] 2 Q. B. 455, at p. 469. (2) [1897] A. C. 615.

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was no doubt under this section: see *The Beta* (1); *The Uhla* (2); *The Sylph* (3); *The Malvina* (4); *The Merle* (5), so far as it deals with that section, and the judgments in *The Zeta*. (6) The judgment in favour of the Board must at least have proceeded on this ground, though it would not necessarily proceed on the ground that there was a maritime lien for damage.

It was argued by counsel for the salvors that although the Board might have a right to proceed in rem, yet they had no maritime lien for the damage. As the damage came last in this case, it is very questionable if it matters whether the Board had a maritime lien or not, because the Board having a right to proceed in rem for their damage the question rather is whether the salvors' claims are to have precedence of the right of the Board to enforce payment of the damage done by the *Veritas*. I deal with the salvors' rights later on. However that may be, in my opinion, if it be material to decide the point (the case was argued as if it were), as the law now stands the Board had a maritime lien for the damage. The question is one upon which a great deal of argument may be expended, but the ground is now mostly covered by authority. It was decided in *The Bold Buccleugh* (7) that a maritime lien arises in the case of damage done by one ship to another in favour of the injured party. The important passage from the judgment delivered by Sir John Jervis in that case is as follows: "Having its origin in this rule of the civil law, a maritime lien is well defined by Lord Tenterden to mean a claim or privilege upon a thing to be carried into effect by legal process, and Story J. (8) explains that process to be a proceeding in rem, and adds that wherever a lien or claim is given upon the thing, then the Admiralty enforces it by a proceeding in rem, and indeed is the only Court competent to enforce it. A maritime lien is the foundation of the proceeding in rem, a process to make perfect a right inchoate from the moment the lien

(1) (1869) L. R. 2 P. C. 447.
(2) (1867) L. R. 2 A. & E. 29, n.
(3) (1867) L. R. 2 A. & E. 24.
(4) (1862) Lush. 493; on appeal (1863) Br. & L. 57.
(5) (1874) 2 Asp. M. L. C. 402.
(6) [1893] A. C. 468.
(7) (1851) 7 Moo. P. C. 267.
(8) 1 Sumner, 78.

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attaches, and whilst it must be admitted that where such a lien exists, a proceeding in rem may be had, it will be found to be equally true that in all cases where a proceeding in rem is the proper course, there a maritime lien exists which gives a privilege or claim upon the thing, to be carried into effect by legal process." That the reasoning in that case is not strictly correct is shewn by more recent decisions where it has been held that there may be rights to proceed in rem without a maritime lien—e.g., *The Heinrich Bjorn* (1), where it was held that there is no lien on a foreign ship under 3 & 4 Vict. c. 65, s. 6, for necessaries; *The Two Ellens* (2), no lien for necessaries under s. 5 of the Act of 1861; *Westrup* v. *Great Yarmouth Steam Carrying Co.* (3), no lien for towage. In all these cases a proceeding in rem lies. In Browne's Civil Law, (1802) 2nd ed. vol. ii. p. 143, the following passage occurs: "The torts of the master cannot be supposed to hypothecate the ship; nor, in my humble judgment, in strictness of speech, to produce any lien on it"; and I do not know of any English case earlier than *The Bold Buccleugh* (4) in which the doctrine that collision gives rise to a lien is to be found: see the notes collected by Mr. Marsden at p. 87 of the 4th edition of his work on Collisions at Sea. The growth of the idea of maritime lien is also referred to in the President's judgment in *The Dictator*. (5) The decision in *The Bold Buccleugh* (4) has, however, whether rightly founded or not, been now acted on for fifty years, and in the case of *Currie* v. *McKnight* (6) Lord Watson made the following remarks: "The principle of that decision [*The Bold Buccleugh* (4)] has been adopted in the American Courts; and in the Admiralty Court of England it has for nearly forty years been followed in a variety of cases in which lien for damage done by the ship has been preferred to claims for salvage and seamen's wages, and upon bottomry bonds." So far these observations relate to damage in collisions between ships, but the principle seems to be substantially the

(1) (1886) 11 App. Cas. 270.
(2) (1872) L. R. 4 P. C. 161.
(3) (1889) 43 Ch. D. 241.
(4) 7 Moo. P. C. 267.
(5) [1892] P. 304.
(6) [1897] A. C. 97, at pp. 105, 106.

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same so far as regards damage done by a ship which, if done on the high seas, would formerly have been within the jurisdiction of the Admiralty Court: see *The Sarah* (1), and Lord Herschell's judgment in *The Zeta* (2), where, after examining the cases, he came to the conclusion that it is impossible to maintain the proposition that the word "damage" was, according to the well-understood meaning of the phrase in the Admiralty Court, confined to damage due to collision between two ships. Under s. 7 of the Act of 1861 the Court has jurisdiction over any claim for damage done by any ship, and, therefore, has jurisdiction over this claim by the Board, even if it be said that the damage in question was not done on the high seas. Some of the cases I have already referred to above are in point. In my opinion, it follows from the decision in *The Bold Buccleugh* (3) that there is a maritime lien for this kind of damage if it had occurred on the high seas, and it seems to follow that it was intended the law should be the same as to damage done by a ship elsewhere; and, therefore, whether the damage in question was done in the body of a county or not is immaterial, and I need not enter into that question. This is the manner in which s. 6 of the 3 & 4 Vict. c. 65, has been regarded so far as damage received by a ship in the body of a county is concerned: see *The Bold Buccleugh* (3), where the collision occurred in the river Humber; the judgment of Lord Bramwell in *The Heinrich Bjorn* (4); and the judgment of Lord Halsbury in *The Sara*. (5) It is not, in my opinion, inconsistent with these views that, while there is a lien on a ship for the damage done by her, there may be no lien in favour of an injured ship in cases like *The Zeta* (2), where the reasons which have led to the recognition of a lien on a ship are not applicable.

The next and, in my opinion, the real question in the case is whether the claim of the Board has precedence over the prior lien of the salvors. That salvors have a lien was not disputed. In the cases for a very long time past when a lien for salvage

(1) (1862) Lush. 549.
(2) [1893] A. C. 468.
(3) 7 Moo. P. C. 267.
(4) 11 App. Cas. 270.
(5) (1889) 14 App. Cas. 209, at p. 216.

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is spoken of it is always treated as if there was no question but that there is a maritime lien for salvage. It is probably natural that the idea of this lien should have developed more readily than that of a lien for damage. There is no reported case so far as I am aware in which the question has been raised and considered whether a lien for damage takes precedence of a prior lien for salvage. There is, however, the passage from Lord Watson's judgment in *Currie* v. *McKnight* (1) which I have quoted above. It is possible that Lord Watson had not fully considered this point, but his judgments are always so full of learning and care that I do not think he would have expressed himself in these terms if he had felt any doubt about the matter.

All the text-writers to whose works I have been referred give precedence to the claim for damage: see Williams and Bruce's Admiralty, 2nd ed. p. 80; Maude and Pollock's Merchant Shipping, by Pollock B. and Bruce J., 4th ed. vol. i. p. 619; Maclachlan on Merchant Shipping, 4th ed. pp. 740, 741; Coote's Admiralty Practice, 2nd ed. 1869, p. 138; Abbott on Shipping, 13th ed. p. 872, by Bucknill J. and Mr. Langley; and Admiralty Jurisdiction and Practice in County Courts, by Dr. Raikes and Mr. Kilburn, p. 123. I have referred to several American text-books, but cannot find any discussion of the point in them. In some of the works I have mentioned the following cases are cited: *The Aline* (2); *The Benares* (3); *Cargo ex Galam* (4); *Attorney-General* v. *Norstedt* (5); but none of these cases appear to me to be in point on the proposition in question for which they are cited. There is, however, this consensus of English text-writers, and no case to be found in which damage has ever been postponed to prior salvage.

It would seem clear that maritime liens may be divided into two classes—first, liens arising ex delicto; and, secondly, liens arising ex contractu or quasi ex contractu. It is almost obvious that liens of the latter class must in general rank against the fund in the inverse order of their attachment on the res. They

(1) [1897] A. C. 97, at p. 106.
(2) (1839) 1 Wm. Rob. 111.
(3) (1850) 7 Notes of Cases, Supp. 50.
(4) (1863) Br. & L. 167.
(5) (1816) 3 Price, 97; 17 R. R. 554.

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are liens in respect of claims for services rendered, and it is reasonable that services which operate for the protection of prior interests should be privileged above those interests. Thus in the present case (subject to a point which will be dealt with hereafter) the second set of salvors are preferred to the first because the first share in the later benefit conferred on the common subject of the liens.

It is also clear that liens arising ex delicto take precedence over prior liens arising ex contractu. The reasons for this are pointed out by Dr. Lushington in *The Aline*. (1) The principal one appears to be that the person having a right of lien ex contractu becomes, so to speak, a part owner in interest with the owners of the vessel. He has chosen to enter into relationship with the vessel for his own interests, whereas a person suffering damage by the negligent navigation of a ship has no option. Reparation for wrongs done should come first; otherwise the injured party might be unable to satisfy his claim out of the res without paying off prior claims which arise in such circumstances that the claimants may be considered to have chosen to run the risk of subsequent events affecting their claims. It has even been held that the maritime lien for damage takes precedence of the lien of the seamen for wages earned by them since a collision: *The Elin*. (2) It was argued before me that salvage claims were not on the footing of claims arising ex contractu, and that on grounds of public policy they should have precedence over subsequent damage claims. The right to salvage may, but does not necessarily, arise out of contract. As the late Lord Hannen said in his judgment in *Five Steel Barges* (3): "It is a legal liability arising out of the fact that property has been saved, that the owner of the property who has had the benefit of it shall make remuneration to those who have conferred the benefit upon him, notwithstanding that he has not entered into any contract on the subject." To this may be added that salvage is not governed merely by a regard to benefit received, but also on grounds of public policy by a due regard to the interests of commerce and humanity. At

(1) 1 Wm. Rob. 111, at p. 118. (2) (1883) 8 P. D. 129.
(3) (1890) 15 P. D. 142, at p. 146.

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the same time the right to proceed against the res is to obtain payment of the reward given for services rendered, and the salvors have had the option of rendering their services, and in deciding to render them are in a position to consider the risks they may run in recovering their reward, and whether or not it is advisable to render the services. From the time of rendering the services they are practically in the same relative position as a creditor who has obtained a lien strictly ex contractu, and, while taking precedence over prior claims ex contractu and prior salvages, in my opinion the considerations I have referred to shew that their claims should be postponed to subsequent damage claims, and in my judgment it is in the best interests of careful navigation that this should be so. I can see no satisfactory ground on which the claims of an injured party should be postponed to the claim of one who seeks to obtain a benefit for prior services rendered to what is in this Court commonly spoken of as the "wrong-doing vessel." Such principles as can be applied and general considerations are, in my judgment, the other way, and even if the damage in this case did not give rise to a maritime lien but only to a right to proceed in rem, it seems to me that the latter right should be enforceable in priority to the salvage claims. For all practical purposes in a case where the damage comes last the position of the injured party so far as regards claims arising prior to the damage is much the same whether he has a lien or only a right of process.

I may sum up these remarks thus: There is a right to arrest a ship to obtain reparation for damage done by her which is not affected by prior claims against her arising from hypothecations, which create interests in her along with those of her owners. This right was no doubt enforced by the High Court of Admiralty before the doctrine was established in the case of *The Bold Buccleugh* (1) that there was a maritime lien for damage, and as regards such prior claims the right aforesaid would not seem to depend on the existence of a maritime lien for damage. A salvage claim may be regarded as if there had been a hypothecation to secure the reward to the salvors for

(1) 7 Moo. P. C. 267.

services rendered, and that reward ought not to be recovered against the res to the detriment of a claimant in respect of subsequent damage. The matter is of importance when it is not possible or convenient to proceed against the owners personally, and it would be unreasonable and inequitable to satisfy out of the res a claim for a reward for prior salvage services, which the salvors elected to render, in preference to a claim in respect of damage done.

The last point to deal with is that relating to the claims of the salvors inter se. Unless there is something to prevent the principles aforesaid from applying the claim of the tugs is to be preferred to that of the *Caledonian*. But counsel for the latter vessel contended that in consequence of the decision in the case of *The Devonian* (1) the claim of the *Prairie Cock* could not have precedence over that of the *Caledonian*, and that as the *Sea Cock* belongs to the same owners as the *Prairie Cock*, the claim of the *Sea Cock*, so far as her owners are concerned, also could not have precedence. To succeed in this contention, it was practically admitted that it must be shewn that the owners of the *Prairie Cock* and the *Sea Cock* and the master and crew of the former could not recover salvage against the *Veritas*. But the tugs have recovered judgment for their services in their suit, the question of priorities only being reserved, and the owners, master, and crew of the *Caledonian* did not raise any objection in that suit to the plaintiffs therein recovering judgment. They did not intervene until after judgment, although they had previously entered a caveat against payment out of the proceeds. The judgment appears to conclude them now. The ground upon which it was sought to make out the point for the *Caledonian* was by applying the decision of the Court in the case of the collision between the *Devonian* and the *Veritas* that the *Veritas* was to blame by reason of the wrong exhibition of lights on her tug, the *Prairie Cock*. I do not consider it necessary to examine that decision at any length. It is sufficient to notice that there was no finding that the absence of the second masthead light in fact contributed to the collision, and, unless it did, the fact that the

(1) [1901] P. 221.

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Veritas was held to blame under s. 419, sub-s. 4, of the Merchant Shipping Act, 1894, does not appear in the circumstances to make the tug guilty of negligence which caused the collision, so as to deprive the tug of the right to salvage for subsequent services when the vessel was being moved with the object of beaching her. As the control rested with those in charge of the *Veritas*, whatever were the strict statutory obligations, it would have been rather hard, in the circumstances, to hold the tug responsible to the tow for negligence as between the tug and tow. I need not, however, go into this question any further, owing to the finding of the Court being as above stated, and the fact that the judgment was recovered by the tugs without any objection by the *Caledonian*.

The result is that, in my judgment, the claim of the Mersey Docks and Harbour Board comes first; then the claim of the tugs; and lastly that of the *Caledonian*; and payment out must be made accordingly, with costs in each case.

Solicitors for the Mersey Docks and Harbour Board: *Rowcliffes & Co., for W. C. Thorne, Liverpool.*

Solicitors for the owners, masters, and crews of the *Prairie Cock* and *Sea Cock*: *J. W. Thompson & McMaster, Liverpool.*

Solicitors for the owners, master, and crew of the *Caledonian*: *Hill, Dickinson & Co., Liverpool.*

T. L. M.

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July 29.

[IN THE COURT OF APPEAL.]

SYNGE *v.* SYNGE.

Divorce—Desertion—"Reasonable Excuse"—Refusal of Wife to allow Marital Intercourse—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 27.

After a husband and wife had been for some years living apart by (as the Court held) mutual consent, the husband committed adultery:—

Held, that this was not evidence of desertion by him.

A wife who without cause refuses to permit marital intercourse to her husband cannot allege "desertion" by him "without reasonable excuse" if in consequence he refuses to live with her.

Decision of Jeune P., [1900] P. 180, affirmed.

APPEAL by the wife against the decision of Jeune P. (1)

The wife petitioned for dissolution of the marriage on the ground of the husband's desertion and adultery.

At the trial the jury found that the husband had committed adultery with a Miss Hooker. The question of desertion was left for determination by the Court.

The facts and correspondence are fully stated in the judgment of the learned President. (2) The following short summary will be sufficient for the present purpose.

The parties were married on September 27, 1884, and there was one child of the marriage—a boy. The husband was an officer in the army, and immediately after the marriage he and his wife went to India, where they remained until 1888. In that year she first, and he afterwards, returned to England, and they lived together as husband and wife until November, 1889, when he returned alone to India, she remaining in England with her child. Towards the end of 1890 the husband wished his wife to join him in India. She was at first willing to do so, but about that time she had an opportunity of becoming an actress on the stage, and she secured an engagement, and was very successful in her profession. She did not consult her husband before accepting this engagement.

(1) [1900] P. 180. (2) [1900] P. 181.

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She then abandoned her intention of going to India, and wrote to her husband to that effect. When he heard what she had done he determined to return, and at the end of January, 1891, he arrived in England. On February 2, 1891, she wrote to him a letter in which she said that she was determined to pursue her course, and that nothing would induce her in their present circumstances to retire from it. She asked him to promise that he would not try to dissuade her, adding that, unless he could make this promise and adhere to it, it would be much better that they should not meet. On February 12, 1891, she wrote to him, sending him a paper, which "I want you to sign before you come back."

This was the paper :—

"1. You promise me most faithfully that you will not either directly or indirectly endeavour to induce me to leave the stage, or interfere with my professional life in any way whatever.

"2. That when we are living together under the same roof we shall only be nominally living together as man and wife."

Two days later she wrote him another letter, in which she said: "I feel sure that this is much the happiest plan for us to follow, and I hope thereby we shall avoid the misery and unhappiness of our former experiences. You must also promise me not to refer to any of our unhappy differences in the past, but to try to live in peace and quietness, and I on my part promise to do the same."

It does not appear that the husband signed these conditions, but from February to July he lived in the same house with his wife, they occupying separate bedrooms. In July, 1891, he went to West Africa.

On April 28, 1892, she wrote to him at Warri, where he then was: "The experiment we tried from January to July last year was hardly sufficiently successful to make me anxious to repeat it. The extreme insufficiency of the allowance you are pleased to make me renders this devotion to my profession absolutely necessary if I am ever to hope to better my position, which at the present time, were it not for the money I make myself, would be one of extreme poverty, and this is a

condition in which I have no intention whatever of existing, if it can be avoided by any exertions of my own."

In August, 1892, the husband returned from West Africa, and on August 24 he wrote a letter to his wife, in which he asked her to let him know "if your letter to Warri is to be accepted by me as final or not. I have no intention of living the same sort of life as you imposed on me when I was last at home. You had better wire to me, Yes or No."

On August 25 she wrote in reply a letter in which she said: "Why must you make all things hinge on the one condition? I am perfectly willing to be the best of friends and companions to you, if you would only consent to do without what you know is distasteful to me. I can't see why it should not be so, and that we should get on all right if you make up your mind to do so. Why, if you love me so much as you say, you should wish me to do what you know is not congenial to me, and never was, I don't know. Why cannot we agree without that form of what is to you amusement? Surely it would be a lesser evil, looking at it from your point of view, than being altogether away from me?"

After this the husband and wife never lived together again. He resumed his regimental duties at Aldershot, and elsewhere, and she pursued her avocation on the stage.

In 1894 he contemplated returning to India and was anxious that his wife should accompany him, and he wrote to her to that effect. On January 3, 1894, she replied: "I am afraid circumstances render it impossible that I should answer your questions as I would have done in '83–84 after all that has passed. Don't misunderstand me. I bear you no ill-will, but I think we should be better friends at a distance, and I really could not contemplate a life that would mean constant differences of opinion. I think matters had better remain as they are at present."

Early in 1896 the husband returned from India, and on January 21 he wrote to the wife a letter in which he said: "When you have time, will you let me know whether you have made up your mind about what I asked you?"

On February 15, 1896, she replied: "I don't know why you

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should write post-cards and letters, and ask me to say, 'Yes' or 'No.' The matter is far too serious, and I gave you my views on the subject some time ago, which I thought you understood. Leave well alone."

Soon after this the husband met Miss Hooker, and in November, 1896, he took lodgings in her house, St. Olave's, Sandgate, and during his residence there he, as the jury found, committed adultery with her.

On December 4, 1896, he wrote a letter to his wife from St. Olave's, in which he said: "I retire on January 4, and am now on leave pending retirement, owing to being unable through poverty to remain in the army at home, and unable to serve in India on account of my health. Now I think you know all about me. I may add I have virtually settled here."

The President held that the husband had, under the circumstances, not been guilty of desertion, or that, if he had, there was "reasonable excuse" in the refusal of the wife without any sufficient cause to allow marital intercourse. But the learned judge granted the wife a judicial separation.

The wife appealed against the refusal of a decree for dissolution of the marriage.

There was no cross-appeal by the husband.

Bargrave Deane, K.C., and *Le Bas*, for the wife. It is submitted that there was legal desertion by the husband, and that the learned President was wrong in holding that there was not. And, there being desertion in addition to adultery, the wife is entitled to a decree for dissolution of the marriage. The evidence shews that the wife honestly believed that the condition of the husband's health was such as to render marital intercourse undesirable, and if so she was justified in refusing to allow it. At any rate, the Court will never attempt to enforce marital intercourse, and neither a husband nor a wife commits a matrimonial offence in refusing that intercourse: *Weldon* v. *Weldon* (1); *Orme* v. *Orme* (2); *Rowe* v. *Rowe*. (3) No doubt desertion depends to a great extent upon intention;

(1) (1883) 9 P. D. 52, 56. (2) (1824) 2 Addams, Ecc. 382.
(3) (1865) 4 Sw. & Tr. 162.

but the Court has always regarded the adultery of the husband as evidence of his intention to desert his wife: *Stickland* v. *Stickland* (1); especially when, as in the present case, the husband has formed a permanent connection with another woman. It may be admitted that there was no desertion before the husband formed the connection with Miss Hooker. But when he did so and wrote the letter of December 4, 1896, in which he practically announced his intention of continuing to live with her and not with his wife, desertion commenced. When the husband was free by reason of his retirement from the army, he ought to have returned to his wife, and he should have shewn her by his affectionate behaviour that she had nothing to fear in resuming cohabitation with him in the ordinary way, and he might thus have induced her to consent to it. Instead of doing that, he preferred to form a permanent adulterous connection, and it is submitted that his conduct then amounted to legal desertion.

Rippingall v. *Rippingall* (2), upon which the learned President relied, was quite different from the present case.

[COLLINS L.J. In *Thompson* v. *Thompson* (3) it was held that the absence of a husband with the consent of the wife did not constitute wilful desertion by him.]

There the husband had left his wife because of his failure in business, and had gone away in search of business. The wife did not suggest that he should return to her. In the present case she did.

If the decision of the learned President is upheld, the result will be that practically the Court will be able to enforce marital intercourse. When a husband has been guilty of adultery he will always be able to plead that his wife has refused him reasonable marital intercourse, and the Court would have to decide what was reasonable intercourse.

H. Durley Grazebrook, for the husband. From the facts as found by him the learned President was right in saying that the wife had deserted the husband rather than that he had deserted her. There may be "reasonable excuse" for desertion

(1) (1877) 35 L. T. 767. (2) (1876) 24 W. R. 967.
(3) (1858) 1 Sw. & Tr. 231.

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by the husband short of the commission of a matrimonial offence by the wife: *Haswell* v. *Haswell* (1); *Yeatman* v. *Yeatman*. (2) The refusal of the wife to permit marital intercourse was a "reasonable excuse" within the meaning of s. 27 of the Act of 1857. (3) Again, "no one can desert who does not actually and wilfully bring to an end an existing state of cohabitation": *Fitzgerald* v. *Fitzgerald*. (4) When the husband's adultery commenced he was actually living apart from his wife, and practically with her consent, and under the circumstances the adultery did not constitute desertion: *Buckmaster* v. *Buckmaster* (5); *Cooper* v. *Cooper* (6); *Lodge* v. *Lodge*. (7) *Fitzgerald* v. *Fitzgerald* (4) was approved by the Court of Appeal in *Reg.* v. *Leresche*. (8)

[COLLINS L.J. referred to *Oldroyd* v. *Oldroyd*. (9)]

That case followed *Mackenzie* v. *Mackenzie*. (10)

Le Bas, in reply. If a husband forms a permanent adulterous connection, this is at any rate primâ facie evidence of desertion. It is not like casual acts of adultery: *Garcia* v. *Garcia*. (11)

The passage in the judgment of Lord Herschell in *Mackenzie* v. *Mackenzie* (10) which is relied upon was only a dictum: *Russell* v. *Russell*. (12) In *Mackenzie* v. *Mackenzie* (10) and *Oldroyd* v. *Oldroyd* (9) the conduct complained of, though not actually a matrimonal offence, was in the nature of a matrimonial offence.

RIGBY L.J. In my opinion the learned President was right in the conclusions at which he arrived, and I think we ought not to disturb his decision.

(1). (1859) 29 L. J. (P. & M.) 21.

(2) (1868) L. R. 1 P. & M. 489.

(3) By s. 27, "It shall be lawful for any wife to present a petition to the said Court, praying that her marriage may be dissolved, on the ground that since the celebration thereof her husband has been guilty of" (inter alia) "adultery coupled with desertion, without reasonable excuse, for two years or upwards."

(4) (1869) L. R. 1 P. & M. 694.

(5) (1869) L. R. 1 P. & M. 713.

(6) (1875) 33 L. T. 264.

(7) (1890) 15 P. D. 159.

(8) [1891] 2 Q. B. 418, 421.

(9) [1896] P. 175.

(10) [1895] A. C. 384, 389.

(11) (1888) 13 P. D. 216.

(12) [1897] A. C. 395.

COLLINS L.J. I am of the same opinion. It is not necessary to go again through the facts and the correspondence, which are fully dealt with in the judgment of the President. Nor is it necessary to repeat the reasons given by him. He decided two points, on both of which I agree with him. He came to the conclusion (1.) that there had been no desertion by the husband, and (2.) that, if there had been desertion, there was "reasonable excuse" for it, so that it could not give the wife a right to treat it as a matrimonial offence and as the foundation of a case for dissolution of the marriage. Was there then desertion by the husband? The case is a nice one, and perhaps academical, whether the circumstances constitute desertion with reasonable excuse or fail to establish desertion at all. The facts and the correspondence seem to me to shew clearly that the original desire of the husband was to resume the ordinary relations of husband and wife, and that the only reason why they were not resumed was the refusal of the wife to submit to the ordinary conditions of married life. Under these circumstances the husband, on his return from abroad in 1896, invited the wife to say whether she was willing to come back to him and to resume the ordinary relations of husband and wife; and all he got from her was a refusal. It was not until then that he wrote the letter of December 4, 1896, which the wife has sought to treat as the commencement of his desertion. It has been contended that the desertion began then, and on that point it is important to consider what according to ecclesiastical law constitutes "desertion." In *Fitzgerald* v. *Fitzgerald* (1) Lord Penzance J.O. said (2) that, "No one can 'desert' who does not actively and wilfully bring to an end an existing state of cohabitation. Cohabitation may be put an end to by other acts besides that of actually quitting the common home. Advantage may be taken of temporary absence or separation to hold aloof from a renewal of intercourse. This done wilfully, against the wish of the other party, and in execution of a design to cease cohabitation, would constitute 'desertion.' But if the state of cohabitation

(1) L. R. 1 P. & M. 694. (2) L. R. 1 P. & M. at p. 698.

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has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, 'desertion,' in my judgment, becomes from that moment impossible to either, at least until their common life and home have been resumed. In the meantime either party may have the right to call upon the other to resume their conjugal relations, and, if refused, to enforce their resumption; but such refusal cannot constitute the offence intended by the statute under the name of 'desertion without cause.'"

This decision was afterwards approved by the Court of Appeal in *Reg.* v. *Leresche.* (1) These considerations lie at the root of the matter, and these cases shew that the refusal of a husband to cohabit with his wife, even though it is accompanied by actual separation from her, does not of itself constitute "desertion" by him. In the present case there was ex hypothesi no desertion until the adultery was committed. Until then it is clear that the parties were living apart by mutual consent, though there was a strong desire on the part of the husband to live with his wife in the ordinary way, and a refusal on the part of the wife to do so. How can the commission by him of the matrimonial offence of adultery convert into desertion that which was not desertion before? I can quite understand that, where the Court has to determine whether there has been desertion before the commission of adultery, it may be material to take the adultery into consideration as evidence of intention. But here the evidence absolutely negatives the idea that there was desertion before the adultery. The separation was not brought about by reason of the husband's desire not to return to his wife. There is no evidence of his wish to desert her. If she had been willing to allow him to come back to her in the ordinary way, he was quite ready to do so. It is not necessary for us to decide whether there was desertion on the part of the wife. In my opinion there was no desertion by the husband, and if there was desertion the circumstances were such as to afford a reasonable excuse for it.

(1) [1891] 2 Q. B. 418.

ROMER L.J. I agree. I am not prepared to say that, even if a husband and wife be living apart by mutual consent, adultery may not be committed by him under such circumstances as to justify the finding of "desertion." But I do say that in the present case the wife has failed to satisfy me that any matrimonial offence in addition to the adultery has been committed by her husband.

C. A. 1901

SYNGE v. SYNGE.

Appeal dismissed.

Solicitors: *Lewis & Lewis; Berkeley-Calcott, Holloway & Blount, for H. Birch, Thame.*

W. L. C.

BISHOP *v.* BISHOP.

1901 *June* 18.

Divorce—Practice—Particulars—Names of probable Witnesses—Order for Disclosure.

Where in a petition by the wife against the husband he was, for the purpose of establishing cruelty, charged with using insulting language to her in the presence of servants and guests, with the object of humiliating and degrading her, the petitioner was ordered to give particulars, setting forth the names of such servants and guests.

SUMMONS by the husband, the respondent in the wife's cross-petition for dissolution, asking that she should give particulars of (inter alia) two paragraphs in her petition, which were in the following terms:—

Paragraph 3: "That the said Claude Edward Stanley Bishop [the respondent] is a man of most violent and uncontrollable temper, and that he has habitually used coarse and insulting language to your petitioner, and has constantly treated her with insult and contumely in the presence of the servants, and also, but less frequently, in the presence of guests, with the object and intention of humiliating and degrading your petitioner; and that, in consequence of the conduct of the said Claude Edward Stanley Bishop towards her, your petitioner's health has broken down, and her nervous system has become completely deranged."

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Paragraph 13: "That in the autumn of the year 1897, the said Claude Edward Stanley Bishop, without just cause and with the object of annoying, humiliating, and degrading your petitioner, informed one of your petitioner's servants that he had written to the tradespeople with whom your petitioner had been in the habit of dealing, and had told them that they were not to give credit to your petitioner; and the said Claude Edward Stanley Bishop subsequently warned the servant that she was not to supply your petitioner with any money for herself or the children, and he at the same time refused or neglected to supply your petitioner with sufficient money for herself or the children."

The registrar made the order for particulars, including the names of the servants and guests specifically referred to.

The wife appealed, and as it appeared that conflicting decisions had been given from time to time in chambers as to the point of practice involved, the learned President (Sir F. H. Jeune) adjourned the summons into Court for argument.

Durley Grazebrook, for the wife.
Priestley, for the husband.

THE PRESIDENT. I desired that this case should be brought into Court because I thought it was well that once and for all, so far as this decision can be once and for all, it should be decided whether particulars of this kind should be allowed or not. I am quite aware there is some difference of opinion about it, and, it may be, some difference of practice, in chambers, although, so far as I am concerned, in *Abdy* v. *Abdy* (1) I allowed the particulars to be given upon an application in chambers, and I am much obliged to counsel for calling my attention to that case. I have no doubt that in *Abdy* v. *Abdy* (1) I had substantially—I will not say in detail—the same circumstances before me as those which have now been brought before me.

There are two principles which may be in conflict which have to be considered. In the first place, it is a general rule

(1) Unreported.

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The President.

that one side is not compellable to disclose to the other the names of witnesses by which he or she intends to make out his or her case. That is obviously a broad principle of justice. On the other hand, there is a principle that they ought to give all such information as will enable the other side properly to conduct their defence, and part of that information is a statement of everything which is material to the case which the person propounding it has to make. From that point of view we are entitled to look at the analogy afforded by common law cases, and I say it is only the *analogy*, because this Court is not governed absolutely by the practice at common law; and I am very much inclined to think, although the matter has not been much gone into, that if one looked at the earlier practice of the Ecclesiastical Courts, which would govern cases of cruelty and such-like cases, that the tendency, at any rate, of such Courts would have been to allow or require a very full statement indeed of the case to be prepared.

It is a matter which does not require deep research to know this; but in those Courts the pleadings were extremely full, as compared with common law proceedings, and full even, I think, as compared with equity proceedings. I have no doubt that that was for a rather different reason from that which is applicable to the present day, because it is well known that in those days the witnesses were examined by examiners, and not before the Courts, and the examiners had before them, I believe, nothing else but the pleadings in the case; and therefore it was absolutely essential that the pleadings should be extremely full, and they were so. That does not apply at the present day, but the principle is the same—namely, that each side should be fully informed of the particular case intended to be put forward. What I have now to decide is, what is really the justice of the matter. I am not bound by the common law decisions; but when one comes to look at the principles of common law, they lay down very fairly, as I have said, that no one is bound to disclose the names of witnesses, generally speaking, for the obvious reason that people might tamper with them, and there is no reason why persons making out their defence should be entitled to know the actual names of

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witnesses who are to appear against them; but the common law appears to me to have laid down with equal clearness that everything material to the case intended to be set up must be stated. That is the principle applied in cases of slander, because in those cases it may be essential for the purpose of making out special damage that the slander should be known to, or uttered to, particular persons, and the publication to particular persons constitutes, in that case, the gist of the charge. Slander uttered to one person might not be actionable if uttered to another person; in that sense, therefore, it becomes essential to see to whom it is uttered, and that is part of the case which has to be stated, and which the other side is entitled to know for the purpose of meeting the charge.

The test appears to me to be: Are the names of these persons which are sought to be disclosed essential to the case, and part of the gist of the case? If, for example, the statement in this petition had merely been that the husband used violent language in the presence of other persons, it not mattering who they were, it might well be contended that the names of the persons should not be disclosed, though they might be material witnesses. But that is not the case in this instance, because the charge is—and it is the gist of the charge—that the language of the husband was used in the presence of the servants, and also in the presence of guests, both to specific guests and in the presence of servants for the purpose of humbling and degrading the petitioner.

The gist of the matter is that it was said in the presence of servants, and obviously it is so, because a more degrading thing than using language of that sort for the purpose of humbling and degrading a mistress in the presence of the servants one can hardly imagine; and I do think in cases of this kind that the names of the servants and guests form a distinct element in considering the nature of the language used and its effect in regard to the petitioner. As a matter of principle, it appears to me that the slander cases apply, because it is felt there, as I ought to feel here, that it is essential that the other side should know what is the material character and the gist of the case alleged in the petition. Those appear to me to be the general

principles of common law; and I will not refer to them further, because I think it is sufficient to deal with them as a matter of general principle.

I do not think myself that the reference which has been made to cases of seduction really affects the question, because all that those cases go to is that until it is shewn, either by the defence or by a statement on oath, that it is really intended to dispute the fact of the seduction, the Courts will not order particulars which, if the seduction in fact is not to be disputed, become perfectly unnecessary and immaterial, and it might be well in certain cases here to wait and see whether the case was to be really defended, or whether or no a particular set of facts was likely to be put in issue. But I do not think that would be just in this case, because, before the husband does deny these allegations, I think he is entitled to know what he is to be called upon to deny; and it is essential to know whether he is really charged with making use of this language before servants or before persons whom he may recognise when he sees their names, and, therefore, he will know whether he can or cannot deny it.

Upon those principles, I think the decision of the learned registrar is right, and the decision I came to in *Abdy* v. *Abdy* (1), no doubt founded upon the same considerations—though I do not remember my reasons for it—does represent what the practice of the Court at the time was, and what I think the practice of the Court ought to be. I will allow the petitioner ten days from now to give the particulars which were ordered by the registrar, and which I now order. The petitioner may, however, have her costs of these applications.

Solicitors for wife: *C. O. Humphreys & Son.*
Solicitors for husband: *Scott, Spalding & Bell.*

(1) Unreported.

H. D. G.

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July 1, 8, 22.

In the Goods of VANNINI.

Probate—Practice—Will of Domiciled Italian—Appointment of Executor—Probate Refused—Administration with Will annexed Granted.

Even where the husband consents, the Court will refuse to grant probate to the executor named in the will of a married woman, who dies domiciled abroad; but, with such consent, will make a general grant of administration with the will annexed.

In the Goods of Hallyburton, (1866) L. R. 1 P. & M. 90, and *In the Goods of Tréfond*, [1899] P. 247, commented on and explained.

Theresa Alves Vannini, late of Florence, in the kingdom of Italy, formerly a British subject, but at the time of her death the wife of Giovanni Vannini, a colonel in the Italian army and an Italian subject, died on May 21, 1901, at Boulogne-sur-Mer, in the Republic of France, having made a will dated January 27, 1899, in English form, whereby she nominated Charles Robert Rivington her executor, and, in pursuance of a power contained in her marriage settlement, appointed unto her said executor certain real estate in England, settled upon her marriage, in trust for her said husband.

The will was a valid execution of the power, but was not in the form required for a will by Italian law.

The deceased did not die possessed of any property in Italy in respect of which probate or administration to her estate was required, nor was she possessed of any property in Great Britain beyond her share in the said real estate and the accruing income arising therefrom, and also the income accruing during her life to her from divers funds held upon the trusts of the wills of her late uncle and late brother, of both of which Charles Robert Rivington was a trustee.

The value of the estate passing under the will now in question was about 6500*l.*

Mr. Rivington, as sole executor, applied for probate in the registry, but the learned registrar was of opinion that, without the sanction of the Court, he could not make a full

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VANNINI, IN THE GOODS OF.

grant, but only a limited grant of administration with the will annexed.

As the husband, who, with the exception of a small legacy, was the universal legatee named in the will, concurred in the application, the executor now moved the Court for a grant of probate.

The case came on before Gorell Barnes J. on July 1st and 8th, but stood over for production of an affidavit as to the law of Italy, the learned judge, however, expressing the opinion that the registrar was right in declining to make a grant to the applicant as executor.

The object of pressing for probate was to avoid the necessity of paying a premium to a guarantee society as surety.

The affidavit of Gino Pierantoni, advocate of the Court of Cassation in Rome, stated that the document in question, not being a holograph will or drawn up by a notary, was not made in conformity with and did not fulfil the requirements of the Italian laws and constitution; but, as the deceased died without issue and without leaving father or mother, brother or sister, nephew or niece her surviving, and as the husband of the deceased "consents to the contents" of the said will, the dispositions contained therein would be upheld in the Italian Courts of law, and in the event of the will being admitted to probate or otherwise judicially recorded as valid and effectual in the Courts of Great Britain, "the provisions of the will would be carried out in Italy as being in accordance with Italian law."

Priestley, for the executor, moved for probate, and cited *In the Goods of Tréfond* (1) in support of his contention, that, where the husband consents, the Court should make the full grant to the person named in the will as executor, and thus avoid the necessity for sureties. [He also referred to *In the Goods of Hallyburton.* (2)]

THE PRESIDENT. I understand that Gorell Barnes J. pointed out, when the case was before him, that the grant in

(1) [1899] P. 247, 250. (2) L. R. 1 P. & M. 90.

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The President.

Hallyburton's Case (1) was, in fact, a limited grant, although the report makes it appear otherwise. Mr. Registrar Hannen has called our attention to this fact, and it is so stated in the latest edition of Tristram and Coote's Probate Practice, 13th ed., at p. 142. It was further pointed out by Gorell Barnes J. that the intention of the judgment in *Tréfond's Case* (2) appeared to be to give, not a grant of probate, but a general grant of administration with the will annexed in such cases as this. That was my intention, as appears from the closing words of my judgment. I entirely concur in the views of the registrar and of Gorell Barnes J., and, although I am always anxious to save unnecessary expense to an estate, I do not think that the applicant can take the grant as executor. He is, however, entitled to a full grant of administration with the will annexed.

Solicitors: *Rivington & Son.*

(1) L. R. 1 P. & M. 90.

(2) [1899] P. 247, 250.

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July 29.

IN THE GOODS OF ELIZABETH ANN BEST.
" " HANNAH WINTERSGILL.
" " WILLIAM BALL.
" " SARAH ANN WALKER.
" " ELLEN GRADWELL.
" " MARIA (OTHERWISE MARION) WAITE.
" " JAMES PLUNKETT (OTHERWISE WHITEMORE).
" " FREDERICK JOHN SWINDELLS.
" " JOSEPH KENTON (OTHERWISE JOSEPH KENTON SCHOFIELD).
" " WILLIAM CLARKE.
" " WILLIAM HENRY HINCHLIFFE.

Probate—Practice—Administration—Intestate Estates—Duchy of Lancaster—Death of Holder of Title—Death of Administrator appointed by her—Nominee of her Executors—Form of Grant—Administration Bond—Sureties dispensed with.

The Court allowed the executors appointed under the will of Her late Majesty Queen Victoria to nominate a person to take a number of grants for their use in the estates of persons who had died domiciled in the County Palatine of Lancaster, and which had been either wholly or partially unadministered.

The Court, however, while consenting to dispense with sureties, required that, inasmuch as the administrator was not to take for the use of the Sovereign, but for the use of the late Sovereign's executors, he should enter into the usual administration bond.

MOTIONS for administration de bonis non.

In and before 1898 letters of administration to the personal estates and effects of the above-named intestates were granted to Francis Whitaker, solicitor for the affairs of the Duchy of Lancaster, as the nominee of Queen Victoria, for the use of Her late Majesty in right of Her said Duchy.

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On April 8, 1900, Francis Whitaker died, without having fully administered the said estates and effects; and on January 22, 1901, Her late Majesty died.

On May 18, 1901, His Majesty King Edward VII., by warrant under the Royal Sign Manual of that date (1), countersigned by the Right Hon. Lord James of Hereford, the Chancellor of His Majesty's Duchy of Lancaster, commanded Frederick William Biscoe, His Majesty's Advocate and Procurator-General, in this behalf to apply to the Probate Division that letters of administration of such part of the aforesaid estates and effects as was left unadministered be granted to Reginald Charles Hart Dyke, the present holder of the office of solicitor for the affairs of the said Duchy, in order that the respective administrations might be completed.

The warrant had been filed in the Principal Probate Registry; and the consent in writing of the executors of Her late Majesty having now also been filed,

Cleave moved for grants of administration de bonis non.

JEUNE P. said that, having discussed the subject of these applications with Gorell Barnes J., before whom they originally came, he would permit the executors of Her late Majesty to nominate the present Solicitor for the Duchy of Lancaster to take the grants on their behalf. The grants would be to Reginald Charles Hart Dyke for the use and benefit of the Duke of Connaught, Princess Henry of Battenberg, and Sir Fleetwood Edwards, in their capacity as executors of Her late

(1) It was Her late Majesty's custom to sign a separate warrant in each case; but His Majesty King Edward VII. has signed a general warrant authorizing the Chancellor for the time being of the said Duchy to sign a separate warrant in each case, directing Reginald Charles Hart Dyke, the solicitor for the affairs of the Duchy, or other the person for the time being holding that office, or such other person or persons as the Chancellor might appoint by any writing under his hand, to apply to the Probate Court for letters of administration in respect of the personal estates and effects of all persons dying domiciled within the County Palatine of Lancaster, intestate, being bastards, without husband, wife, or issue, or otherwise, without husband or wife, child, parent, or any known relation.

Majesty. The administrator must file the usual administration bond, but sureties might be dispensed with. (1)

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Solicitor: *Frederick William Biscoe.*

H. D. G.

GARNETT-BOTFIELD *v.* GARNETT-BOTFIELD AND OTHERS.

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July 31; *Aug.* 1.

Probate—Clauses in Will inserted by Inadvertence of Solicitor—Reading over—Testamentary Capacity—Due Execution—Knowledge and Approval—Presumption of Law.

Without impugning the general rule of law that a competent testator who reads over his will, or to whom it is read over, is to be held to have approved its contents, it is still open to the tribunal before whom the question of the validity of the document may come to find as a fact that the will was not read over in a proper way.

The general rules stated in *Guardhouse* v. *Blackburn*, (1866) L. R. 1 P. & M. 109, and commented on in *Fulton* v. *Andrew*, (1875) L. R. 7 H. L. 448, discussed.

THE plaintiff, Alfred Clulow Fitzgerald Garnett-Botfield (a minor), by his guardian ad litem, Walter Dutton Garnett-Botfield, claimed, as a devisee and legatee named in a will dated January 6, 1898, revocation of probate of a later will dated December 29, 1898, and asked the Court to pronounce for the true force and validity of the two documents as together constituting the true last will of John Aaron Howard, deceased, but omitting from the later document the clauses therein numbered 1 and 15, and part of clause 16. These clauses were in the following terms:—

"1. I revoke all former wills.

(1) In another case (Richard Pye, deceased) the Royal Warrant was dated December 20, 1900, but Her Majesty died before the motion came on.

In two other cases (William Stephenson, deceased, and Margaret Rae, deceased) orders for administration were made, but had not passed the seal, before Her late Majesty died.

In the case of Henry Holden, deceased (counsel, J. H. Murphy), the death of the intestate took place in the present reign.

In all these cases grants were made similar in form to the others, save that they were fresh grants, and not grants de bonis non.

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"15. I give and bequeath the residue of my personal estate to my son John Brereton Howard, and I also devise my manor of Brereton-cum-Smethwick and my capital messuage or mansion-house called Brereton Hall, with the outbuildings, yards and gardens thereto belonging, and all my messuages, farms and lands, hereditaments and premises situate in the townships of Brereton-cum-Smethwick, Holmes Chapel, Arclid Ranage, or elsewhere in the county of Chester, and all other my real estate, both freehold and leasehold, hereinafter called my Brereton Hall estate, subject as is herein mentioned, unto and to the use of my said son John Brereton Howard in fee simple, if he shall live to attain the age of twenty-one years; but in the event of my leaving other children living besides the said J. B. Howard, then I direct my trustees to raise out of my said real estate in the county of Chester aforesaid the sum of 20,000*l.*, to be divided equally among such other children of mine except the said J. B. Howard. And in the event also of the decease of the said J. B. Howard in my lifetime, then I give the residue of my personal estate and devise such real estate as is hereinbefore devised to him to the eldest of any other sons of mine who shall attain the age of twenty-one years, subject to the raising, as hereinbefore mentioned, of the said sum of 20,000*l.* for the benefit of the younger children. And in the event of there being no son of mine who shall live to attain the age of twenty-one years, then I give the residue of my personal estate and devise such real estate, subject as aforesaid, to the eldest daughter of mine who shall attain the age of twenty-one years.

"16. [In the event of my dying without leaving any children, then I give the residue of my personal estate and devise all my said real estate in the county of Chester to my cousin and godchild, being the second son of the said W. E. G. Botfield, in fee simple if he should live to attain the age of twenty-one years; but if he shall die under that age, then I give the residue of my personal estate and devise my real estate in the county of Chester to my trustees, upon trust to sell the same and divide the proceeds equally between the other children of the said W. E. G. Botfield who may then be living]; but if there

shall be no such child or children of the said W. E. G. Botfield living, then I give the residue of my personal estate and devise such real estate to the said W. R. Court absolutely."

[The portion of clause 16 which the plaintiff sought to omit from the probate is indicated by brackets.]

In his statement of claim (paragraph 3) the plaintiff pleaded "that the said deceased did not know of certain clauses and parts of clauses contained in the said will dated the 29th December, 1898" (as hereinbefore set out); the substance of the case which the plaintiff intended to set up under this plea being "that the deceased gave no instructions for the said clauses and part of clause 16; they were never read over by or to him, and he did not know that they had been inserted."

William Egerton Garnett-Botfield and William Roylance Court were appointed executors of the will of December 29, 1898, and in their statement of defence they pleaded that they, on April 21, 1900, took probate in common form of that document as the true last will of the deceased, and that they did so after due inquiry in good faith, and without notice of the allegations now put forward by the plaintiff in paragraph 3 of his statement of claim. They further pleaded that they did not admit any of these allegations.

Robert Howard, another defendant, in his defence denied each and every allegation contained in paragraph 3 of the statement of claim, and pleaded revocation of the earlier by the later document.

The defence filed on behalf of John Brereton Howard (an infant) alleged revocation by the deceased of the earlier document, and that the true last will of the deceased was that of which probate had been taken by the executors. This defence also formally traversed the allegations in paragraph 3 of the statement of claim.

In reply to the last-mentioned defendant, the plaintiff denied revocation of the earlier document, denied that the document of which probate had been granted alone constituted the true last will of the deceased, and joined issue on the other portions of this defence.

Notice of trial was given by the plaintiff before the Court

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and a special jury, but, by consent, the case was taken before the Court itself.

Robson, K.C. (*G. Henderson* with him), for the infant defendant, John Brereton Howard. Apart from the oral evidence, the document itself is conclusive. In the absence of any suggestion of fraud, it contains the most satisfactory evidence that can possibly be given of the testator's intentions. It is a will drawn by a solicitor upon instructions. It was in the testator's own custody for about two months before it was executed, and when he went to execute it he told the solicitor that he had read it.

[THE PRESIDENT. Would you contend that distinct evidence of mistake, apart from fraud, should be excluded?]

Yes. If the mistake is that of the solicitor, it binds the testator if the will has been read over.

The Courts will not go beyond fraud in looking behind a will, unless the mistake is of so obvious a character as to be apparent on the face of the document itself.

[THE PRESIDENT. Suppose the written instructions could be produced, and it turned out that the will in some material respect did not carry out those instructions.]

It would be very dangerous to allow the instructions to vary the will.

Guardhouse v. *Blackburn* (1) deals with the subject very fully and more neatly than *Fulton* v. *Andrew* (2), where a number of issues were raised. The broad principle there laid down seems to be that the will is to be taken to represent the intentions of the testator, notwithstanding any collateral intention at the time he executed it. In *Morrell* v. *Morrell* (3) the mistake was pretty obvious with the addition of a small amount of extraneous evidence, but the Court would not have struck out the word "forty" in that case if the will had been read over to the testator. It is impossible to conceive such evidence as, apart from fraud, would justify the Court in upsetting a will which has been read over by a competent

(1) L. R. 1 P. & M. 109. (2) L. R. 7 H. L. 448.
(3) (1882) 7 P. D. 68.

testator. To upset such a will would be tantamount to saying that you know the mind of the testator better than he knew it himself. Who is to say that, when the will was read over by the testator, his intelligence was not sufficient for the occasion? *Collins* v. *Elstone* (1), which was decided on the authority of *Morrell* v. *Morrell* (2), is another very strong case. The clause of revocation in the present will must stand good, according to the decision in *Collins* v. *Elstone*. (1)

Bargrave Deane, K.C. (*Leigh Clare* with him), for the defendant, Robert Howard. If the revocation clause is to be struck out of the later will, are the legacies to persons mentioned in both wills and the rent-charges to the widow to be cumulative? The defendant relies on *Guardhouse* v. *Blackburn* (3) as binding on the Court. Mr. Goodman, the solicitor in the present case, has had to trust entirely to his memory in regard to the alleged mistake. *Fulton* v. *Andrew* (4) was really an acceptance of the rules laid down in *Guardhouse* v. *Blackburn*. (3)

Middleton, for the executors.

Inderwick, K.C. (*Priestley* with him), for the plaintiff. *Fulton* v. *Andrew* (5) was argued mainly upon the point whether the judge who tried the issue had misdirected the jury. The House of Lords held that there was no such unyielding rule of law as had been laid down in *Guardhouse* v. *Blackburn* (3), and that the learned judge had not misdirected the jury. The result of the judgment in the House of Lords is that there is no such hard and fast rule of law as the other side are contending for here, and that very great and careful consideration must be paid by the Court in each separate case in coming to a conclusion as to what the reading over really was and the weight to be attached to it. It must have been of such a character as to bring to the testator's mind that there were discrepancies between the will, as drawn, and the instructions which he had given. In the present case, the reading over by Dr. Hawkins did not draw the testator's

(1) [1893] P. 1.
(2) 7 P. D. 68.
(3) L. R. 1 P. & M. 109.
(4) L. R. 7 H. L. 448, at p. 464.
(5) L. R. 7 H. L. 448.

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attention to the particular clauses. When the will was read over after the death, almost everybody then present was of opinion that a serious blunder had been made. The position is this: Mr. Goodman had no instructions to revoke the devise of the particular estates in question; to revoke them is in substance, though not in detail, to revoke the earlier will. His definite instructions were, in fact, to continue the devise of those estates as contained in the earlier document. It is under these circumstances that the plaintiff asks the Court to strike out the clause of revocation. He also asks that the devise of those estates as contained in clauses 15 and 16 be also struck out. This would leave no devise in the later will, and that in the earlier will would take effect, the two wills being then read together. The Courts take a less restricted view on such matters as this now than they did formerly, and although what the plaintiff asks is going further than other cases, yet, if the only way in which the testator's intentions can be carried out in regard to the substance of his estate is by striking out the revocation clause, then although his intentions in one or two minor matters may not be carried out, the Court should strike out the clause. This is a case of first impression, but what is asked is not beyond the power of the Court to do.

THE PRESIDENT (SIR F. H. JEUNE). The facts in this case are sufficiently clear; and having, in the course of the hearing, taken an opportunity to look into the law and authorities bearing on it, I do not consider it necessary to reserve my judgment.

In *Guardhouse* v. *Blackburn* (1) Sir J. P. Wilde referred to certain general rules which, if they could be taken in their strictest sense, would form a convenient guide in cases such as this. There is no doubt, when one looks at his judgment and at his decision as dealt with in *Fulton* v. *Andrew* (2), that Sir J. P. Wilde intended to hold that when once it is proved that a will was read over to a competent testator, that puts an end to the matter.

(1) L. R. 1 P. & M. 109. (2) L. R. 7 H. L. 448, at p. 464.

The decision in *Fulton* v. *Andrew* (1) does not, I think, in words, throw any substantial doubt on that rule of law. Lord Cairns accepted the validity of the rule as so expressed; but, as a matter of fact, the decision in *Fulton* v. *Andrew* (1) left open the consideration applicable to all cases of this kind, and does away — and was, perhaps, intended to do away—with the rigidity of that rule, and I must also say with the weight which Sir J. P. Wilde attached to it. I say this, because in *Fulton* v. *Andrew* (1) there was conclusive proof that, as to the residuary clause, the instructions differed from the will. Mellor J. in that case left to the jury the question whether the testator knew and approved of the residuary clause. No doubt in so doing he did not lay down the rule of law in the same words as Sir J. P. Wilde had employed in the earlier case; and the House of Lords, when dealing with the cases, pointed out that, without impugning the validity of the rules, as a whole, laid down by Sir J. P. Wilde, it might be that the jury, who decided the issues of fact in *Fulton* v. *Andrew* (1), were not satisfied that the will had been read over in the way it ought to have been. This, therefore, left the matter very much open. If there were strong reasons for supposing that the will or any particular part of it does not meet the testator's intentions, then, in my view, it is always open for the tribunal which is called upon to deal with the question of the reading over of a will to consider as a fact whether it was read over. When, therefore, it is once left to be dealt with upon the evidence, the matter becomes very much at large. Without impugning the general rule of law that a competent testator to whom a will is read over is to be held to have approved its contents, the door is still left open to the tribunal before whom the consideration of the document may come to find as a fact that the will was not read over in a proper way. The general rule, therefore, does not carry us the whole way, and in this case I have to consider whether the evidence of the testator's intention, expressed, as it was, in a variety of ways, is so strong as to lead me to say that the will was not properly read over to or by him. It cannot, I think,

(1) L. R. 7 H. L. 448.

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be disputed that the testator's intentions were not carried out in one respect by the last will. Mr. Goodman's evidence alone is tolerably conclusive on that point, and I accept his evidence. He has been obliged to come here and admit that, by him or in his office, a mistake was made in failing to carry out the intentions of the testator; although he was not able to produce the exact instructions which he says he received.

Still, apart from that, I have no doubt that he meant to convey that the intention of the testator was to carry out the will of January as regards the devolution of the Brereton estate. The will of December does not do that; and it is admitted that the 16th clause, which refers only to the case of children dying in the lifetime of the testator, operates, and can only operate, by reading into it the word "such," or some similar word. It is only in this way that the provisions of the earlier will could be reproduced in the later one, in the way which Mr. Goodman says that the testator intended. I have no doubt, from the whole evidence, that the testator did not intend that the Brereton estate should go to his uncle Robert, or to Robert's descendants. So strongly did he feel that that estate should not go to Robert, or to Robert's children, but should go to somebody else, that actually in the last will he deliberately put in a person who had no claim upon him, namely, Mr. Court, rather than that the estate in question should go to Robert. One could not have stronger evidence of his intention on that point. But what I have to determine is whether that evidence, taken in conjunction with the other evidence in this case, should lead me to hold, as against the rule of law to which I have previously referred, that he did not know and approve the contents of the last will. It appears to me difficult to suppose that he did not read that will sufficiently to understand it. I do not feel able to disbelieve the statement which he made to Mr. Goodman that he had read the will. The whole of the probabilities appear to point to his having done so; and we know that, after it was executed, the will was his constant companion and formed the most frequent topic of his conversation. It is almost impossible to suppose that, having had the will drawn up, and having the draft by him,

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he would not have read through a document in which he exhibited so much interest. He said himself that he read it, and that is evidence which I can hardly reject. As regards the evidence of Mrs. Howard, the widow of the testator, it might well be that he read the document without her being aware of the fact. Hers is, therefore, merely negative evidence on the point. I have come to the conclusion, from the probabilities and direct evidence, that he did read it, and that he read it sufficiently for all purposes. I am not losing sight of the words reported to have been used in *Fulton* v. *Andrew* (1), to the effect that merely looking at a will might not be sufficient. I quite agree that a testator simply casting his eye over his will might not be deemed enough; but in view of the fact that this testator had made an earlier will, that he was making a fresh will with certain alterations, and that it was the difference between the two wills that was the matter of particular interest to him, and seeing that he was a man of capable mind, he would surely have had his attention fixed upon or directed towards the points of difference between the two documents. That he did not, perhaps, appreciate the full effect of the two clauses 15 and 16 is quite possible; and it is probable that he relied on Mr. Goodman, and would have accepted the latter's statement as to the form and effect of those clauses. I strongly suspect that therein lies the real explanation and root of the whole matter: that, as regarded the legal drafting and its effect on the devolution of the property in question, those were matters on which he trusted his lawyer, Mr. Goodman, who admitted in the witness-box having made a mistake in the carrying out of the technical details. It is quite likely that Mr. Goodman did not notice it at the time, and that the testator also did not notice or appreciate it. But then comes in the judgment of Sir James Hannen in *Morrell* v. *Morrell*. (2) Although that case is distinguishable from the present one upon the facts, the law is concisely stated. The view taken in that case it is impossible for this Court now to depart from. It would be quite out of the question to hold that because it is the solicitor who has made the slip the

(1) L. R. 7 H. L. at pp. 463, 464. (2) 7 P. D. at pp. 70, 71.

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testator is not to be held responsible for that slip. It cannot, in such circumstances, be successfully contended that the testator did not know and approve of the contents of the will which he signed, although it clearly did not carry out the instructions.

I am asked in the present case to do something which the Court has never, I think, been asked to do before: not only to strike out portions of the last will, but also to eliminate the clause of revocation contained in it, so that the earlier will may be read with the later one, making a composite document. That would be uncommonly like making a new will for this testator. I should feel the greatest difficulty, in any case, in acceding to a request to strike out a revocation clause. It is a clause which lawyers and laymen alike can perfectly understand. In the present instance it is, moreover, the first clause in the will; and it is beyond dispute that the testator did intend to revoke the provisions of the earlier will in many respects, and the clause was put in, according to Mr. Goodman's evidence, with the full knowledge of the testator and in accordance with his intentions.

At one period of the case it did strike me that this might be treated as a matter of dependent relative revocation. I can conceive that, in the future, the Court may be called upon to consider very carefully whether in certain circumstances a revocation clause may be so dealt with as to make of an earlier and later will a composite document; and although this may appear very like a suggestion that a new will might be made for a testator, the true state of facts may possibly be that you cannot get at and give effect to the real wishes of a testator without putting two documents together.

In the present instance, however, I am clearly of opinion that to do so would be imposing upon a Court of construction a difficulty, and inflicting upon this Court a danger, which neither the one nor the other ought to be called upon to bear, and which, moreover, the facts do not clearly warrant. I therefore grant probate of the last document alone and in its entirety.

I think that the costs of all proper parties, including

the executors and heir-at-law, should be paid out of the estate.

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Solicitors for plaintiff: *Chester, Broome & Griffithes.*

Solicitors for infant defendant, John Brereton Howard: *Booth & Smee, for FitzHugh, Woolley, Baines & Woolley, Brighton.*

Solicitors for defendant, Robert Howard: *Tatham & Procter, for Barker & Rogerson, Chester.*

Solicitors for executors: *Ayrton, Biscoe & Barclay, for Birch, Cullimore & Douglas, Chester.*

H. D. G.

IN THE GOODS OF NICHOLAS WAY.

1901
Aug. 6.

Will—Construction—Executor according to the Tenor.

A testator, by his will, appointed H. E. "to hold and administer in trust all my estate well known to the said H. E.":—

Held, that as this person had duties to perform, the word "administer" was, without any express instruction to pay debts, sufficient to constitute him executor according to the tenor.

MOTION by a person named in a will that probate be granted to him as executor according to the tenor.

The motion arose upon the construction of the will of Nicholas Way, presumed deceased.

Nicholas Way was master and part-owner of the barque *Golden Fleece*, which traded between the ports of Mauritius and Australia and India. He and his vessel had been engaged in such trading for the last eight years without returning to this country.

On February 14, 1899, the deceased duly made and executed his last will and testament, and forwarded the same by post from Balasore, in India, to Mr. Henry Ellis, of 4, St. Mary Axe, in the City of London, who was co-owner with him of the said vessel, which was believed to have been lost off the Island of St. Brandon on January 10, 1901, with the said Nicholas Way and every other member of her crew.

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The will was in the terms following:—

"This is the last will and testament of me, Nicholas Way, master of the bark (1) *Golden Fleece*, now lying in Balasore Roads, India, revoking all former wills.

"I will that after my decease Edward Merrick Cockell, a member of the firm of Arkcoll, Cockell & Chadwick, of 67, Tooley Street, London, shall be one trustee, and Henry Ellis, of Leadenhall Chambers, No. 4, St. Mary Axe, London, shall be the other trustee, to hold and *administer* in trust all my estate well known to the said Henry Ellis.

"That is to say, to pay to my wife, Elizabeth Payne Way, twelve pounds sterling per month as long as the said E. P. Way shall live, and after her decease to continue paying the same sum to my daughters collectively, that is, the receipt of the one to be as the receipt of the three. In case of any dispute I give the said trustees power to withhold the payment until they shall settle it amicably among themselves. I wish to give the said trustees the same power I have now myself. However outrageous this will may appear to many, there are those who can certify as to the necessity of depriving all members of my family from acting in this matter.

"As for the soundness of my mind on this occasion, the fact of navigating a ship to and fro will, I hope, be sufficient proof.

"Signed and sealed by the said Nicholas Way this fourteenth day of February, one thousand eight hundred and ninety-nine, in presence of N. Way. (Seal.)

"Witness: James Parkman, 16, Stead Street, South Melbourne, 1st Mate *Golden Fleece*.

"Witness: Reginald Brereton Sewell, 4, Duddington Avenue, South Down Road, Liverpool, 2nd Mate *Golden Fleece*."

Edward Merrick Cockell, one of the trustees named in the said will, predeceased the testator.

The wife of the deceased contended that there had been a failure to appoint any executor, and she entered a caveat, and was duly served with notice of this motion.

(1) *Sic.*

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WAY, IN THE GOODS OF.

The Court was now moved to decree that the said Henry Ellis was the surviving executor according to the tenor of the will of the above-named deceased, and to grant probate to him accordingly.

[There was also a separate motion, in which *Willock* subsequently moved to presume the testator's death, and this was granted.]

Bargrave Deane, K.C., and *Willock*, on behalf of Mr. Ellis, submitted that he was executor according to the tenor. The case is outside the ordinary run of cases, and the word "administer" in the will is sufficient to constitute this gentleman executor according to the tenor.

[They referred to *Pickering* v. *Towers*. (1)]

Harper, for the widow, opposed. In order to constitute a person executor according to the tenor, it is necessary that he should be authorized by the terms of the will to pay the debts of the testator: *In the Goods of Punchard* (2); *In the Goods of Lowry*. (3)

GORELL BARNES J. The cases have no bearing. It is a question of construction of each particular document. *Punchard's Case* (2) does not touch this case, because the judge there said there was nothing for the person named to do: he might be called a trustee, but he had really no duties to perform. In the present instance Mr. Ellis is to have power over the whole estate. I think the effect of this will is that the testator meant Mr. Ellis to deal with the whole of the estate. But if not, the widow would not be entitled to a grant of administration, because Mr. Ellis would take it as a general legatee in trust. I am of opinion that the general construction of this document is in favour of Mr. Ellis being executor according to the tenor. I am sure that is what the testator intended. There being no attestation clause to the will, the applicant will have to satisfy the registrar, in the ordinary course, that the will was properly executed. Subject

(1) (1757) 2 Lee, 401. (2) (1872) L. R. 2 P. & M. 369.
(3) (1874) L. R. 3 P. & M. 157, at p. 159.

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WAY, IN THE GOODS OF.

to that being done, I grant probate to Mr. Ellis as executor according to the tenor. It was necessary to come to the Court; so the widow may have an order for payment of her costs out of the estate.

Solicitors for applicant: *Deacon & Co.*
Solicitors for widow: *Arkcoll, Cockell & Chadwick.*

H. D. G.

1901
July 29.

WHITTON *v.* WHITTON.

Applied. GARFORTHBLES *v.* GARFORTHBLES [1951] P. 218

Divorce—Variation of Settlements—Matrimonial Causes Act, 1859 (22 & 23 *Vict. c.* 61), *s.* 5—*Power of Appointment upon Petitioner's Second Marriage—Children's Reversionary Interests affected—Extinguishment of Respondent's Interests—Principle of quid pro quo.*

The Court has power to vary a marriage settlement so as to deprive infant children of the marriage of part of their interests secured to them by such settlement.

Where a marriage settlement gave the petitioner (wife) power to appoint, after the death of the respondent, in favour of a second husband and the children of a second marriage, the Court, recognising the principle of quid pro quo in such cases, gave to the petitioner power so to appoint, during the respondent's lifetime, a portion of the fund which had been settled for the ultimate benefit of the children of the marriage, upon the ground that the extinguishment of the respondent's interests being part of the order would, while depriving them of that portion, accelerate their interests in the remainder.

ACCORDING to the registrar's report, it appeared that by a decree absolute, made and bearing date November 19, 1900, the marriage of the petitioner and respondent was dissolved by reason of the cruelty and adultery of the respondent.

There were two children issue of the marriage: a girl, aged five years, and a boy, aged three years.

The petitioner, by the order of the Court, was intrusted with the custody of the children.

By an ante-nuptial settlement bearing date December 28, 1893, and made between the petitioner and respondent and the trustees therein mentioned, certain property of the petitioner was settled (inter alia) upon trust for the petitioner for life for

her separate use without power of anticipation, and, after her death, for the respondent for life or until forfeiture or remarriage; and, after the death or other determination of the life interest of the respondent, in trust for the children or remoter issue of the petitioner and respondent as they should jointly or as the survivor should appoint; and in default of any child of the marriage attaining a vested interest, in trust for the appointees of the petitioner; and in default of any appointment and if the petitioner should survive the respondent, in trust absolutely for her separate use without power of anticipation; and if the respondent should survive the petitioner, in trust for the petitioner's next of kin.

The petitioner also covenanted to settle any after-acquired property exceeding in value 200*l.*

It was also provided by the settlement that if the petitioner should survive the respondent and marry again, then she should have power to appoint the income of one-half the said sum of 10,000*l.* to such future husband after her decease, and, subject thereto, the capital and income thereof was to be held in trust for the issue of any such future marriage as the petitioner should appoint: provided that the children of any such future marriage should not take a larger share of the said sum of 10,000*l.* than they would have taken if the said sum of 10,000*l.* had been equally divided between all the petitioner's children by any marriage, who being sons or a son should attain the age of twenty-one years, or being daughters or a daughter should attain that age or marry.

By the settlement the powers of appointing new trustees and of consent were vested in the petitioner and respondent jointly, or the survivor of them.

The respondent brought into settlement two policies of insurance for 300*l.* and 200*l.* respectively upon similar trusts, but with an ultimate trust in favour of the respondent after the death of the petitioner and in the event of there being no children of the marriage who should attain twenty-one years of age.

The respondent, however, made default in payment of the premiums, and the policies lapsed. The property of the

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petitioner in reversion was said to amount in value to about 30,000*l.* Her present net income was about 100*l.* per annum.

The respondent (according to the registrar's report on the petition for maintenance) was, at the time of the marriage, a clerk in the Bank of Ireland and secretary to a public company. He volunteered for service in South Africa, and, since his return in July, 1900, he had been engaged in literary and journalistic work. In September, 1900, on his discharge from military service, he received a sum of 60*l.*, and "altogether earned last year a precarious income of about 400*l.*" He allowed his wife about 3*l.* a week, but refused to pay anything towards her support and the maintenance of the children if the funds of the marriage settlement were to be charged in favour of a future husband and children of the petitioner.

The petitioner asked that the respondent's interest in the settlement be extinguished, except as to his liability to pay the premiums upon the policies of insurance.

She also asked that the power of the petitioner to appoint a moiety of the sum of 10,000*l.* in favour of any future husband and children might, if she should marry again, be exercised by her, notwithstanding that the respondent should still be alive. This, however, was objected to by the respondent and by the representative of the guardian of the children, the respondent contending that this Court had no jurisdiction over the provisions of the settlement.

The costs of the suit up to the making of the decree absolute amounted to the sum of 53*l.* 8*s.* 1*d.*; and it was stated that further costs would probably amount to 100*l.*

The registrar reported that the interests of the respondent in the settlement should be extinguished as if he were now dead.

Priestley, for the petitioner. It is desired, not merely to extinguish the respondent's life interests, but to read the clauses as to one sum of 10,000*l.* as if he were now dead, so that the petitioner, who is a young woman, may, if she marry again, appoint the income from 5000*l.*, half of that sum, to

the husband of the second marriage, and the capital sum of 5000*l.* to the children of such marriage. In *Leigh* v. *Leigh and Cottenham* (1) the Court said that the petitioner (the husband, in that instance) ought to be put in a position to make some such provision if he should marry again. A very large sum of money was involved there, but the petitioner had no power, unless the Court treated the respondent as then dead, to settle any part of the fund upon a subsequent marriage. [He also referred to *Creagh* v. *Creagh* (2) and *Forsyth* v. *Forsyth*. (3)]

As to the costs of the suit and subsequent proceedings, in case the petitioner does not recover them from the respondent the amount ought to be raised upon the children's reversionary interests, which will still amount to about 25,000*l.* if the Court accedes to the first part of the present application. The children are young and living with their mother: it is, therefore, to their interests as well as hers that she should start freed from debt.

The Respondent, in person. The settlement was approved by the Irish Court of Chancery, and this Court has no jurisdiction to vary it, my present domicil being in Ireland.

[THE PRESIDENT. The Court has assumed jurisdiction and has dissolved the marriage without any objection having been raised, and therefore it is able to deal with these matters now before it which arise out of the decree for dissolution.]

As to the application to give the petitioner power to appoint the income arising from the 5000*l.* to a second husband and the capital sum of 5000*l.* to the children of a second marriage, *Pollard* v. *Pollard* (4) is a case almost on all fours with the present one, where your Lordship said that no record appeared to exist of such a variation ever having been sanctioned, adding at the conclusion of the judgment: "The wisest course is to leave undisturbed the provision of the settlement under which the wife has power to resettle only upon the death of her first husband, though it is through his misconduct that the marriage

(1) Unreported.
(2) (1896) 74 L. T. 430.
(3) [1891] P. 363.
(4) [1894] P. 172.

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has been dissolved." The application to vary the settlement is wholly unnecessary, because I offered voluntarily to surrender my life interest for the benefit of the children in case I should survive the petitioner.

I. A. Symmons, for the guardian ad litem of the children, opposed that part of the application which related to the proposed power to appoint on a second marriage. Even if the Court has a discretion to accede to such an application, it has never exercised it to the detriment of the children, who have vested interests under the settlement; and *Crisp* v. *Crisp* (1) decided that there was no power under the Act (22 & 23 Vict. c. 61, s. 5) to grant an application such as this. That case has before now been cited with approval by your Lordship; and in *Noel* v. *Noel* (2) Sir James Hannen ruled in the same way. In *Hartopp* v. *Hartopp and Akhurst* (3) Gorell Barnes J. reviewed the authorities, and held that the section does give the Court power to vary settlements in the way suggested, but the learned judge refused to do it in that case. The principle of the Court has always been that innocent persons should not be prejudiced by the fact that one of the parties to a marriage has been guilty of misconduct which has led to the dissolution of that marriage.

Barnard, for the trustees of the settlement.

Priestley, in reply. The Act clearly gives the Court power to make the order asked for. It does not say that the order is to be for the benefit both of parent and children, or that it must be for the benefit of the parent only, or of the children only. It would be very difficult to conceive a case where, if it was for the benefit of the one, it would not be to some slight extent or from some point of view to the detriment of the other or others. But the opponents of this application lose sight of the fact that the extinguishment of the respondent's life interest necessarily implies the acceleration of the interests of the children. What the petitioner asks for is a quid pro quo.

(1) (1872) L. R. 2 P. & M. 426. (2) (1885) 10 P. D. 179.
(3) [1899] P. 65.

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JEUNE P. I think I can accede to the application made. I am clear I have jurisdiction to do so, and I think no case has ever thrown doubt on that: the case of *Pollard* v. *Pollard* (1) certainly does not throw doubt on the jurisdiction. But one has in these cases to consider what is really for the benefit of the children, because I think the authorities shew that nothing must be done that on the whole would be for the disadvantage of the children. This does not so much turn on the words of the Act of Parliament, but generally on the principle that the children, being innocent parties, ought not to have their interests injuriously affected by the conduct of either of their parents.

But I think I am entitled to consider what the effect of the whole order I ought to make will be, and not that of any particular portion alone. I am favourably impressed by the consideration that the children get a very substantial benefit here in the shape of an acceleration of their interests, owing to the husband's interest being struck out. He might live to a very great age, and therefore they will have got a considerable advantage. I do not think it is unreasonable to say, as a set-off against that, that they may fairly be asked to concede that the wife be allowed to appoint 5000*l.* upon a future marriage. It appears to me a desirable thing to do if one can. It would be hard that a wife who is freed by the misconduct of her husband should not be able to appoint anything at all in favour of a second husband, or in favour of the children of a second marriage; and if, without substantial injury to the interests of the children of the first marriage, such an arrangement can be made, I think it is desirable and is in accordance with the spirit of the Act of Parliament.

Therefore I am prepared to treat the husband's interests as abolished, as if he were dead, which will enable the wife to make the appointment I have mentioned. I think that deals with all the points in contest, because, as to the advancement, I think the husband's power to have a veto on or a voice in that proceeding is a matter that ought also to come to an end. Regarding the costs, I think those may be dealt with as in

(1) [1894] P. 172.

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Pollard v. *Pollard*. (1) I understand that is asked for here, and I think it covers all the costs. (2)

Solicitors for petitioner: *Fraser & Christian.*
Solicitor for guardian of children: *George Watson.*
Solicitors for trustees: *Iliffe, Henley & Sweet.*
Respondent, in person.

H. D. G.

1901

July 30.

[IN THE ARCHES COURT OF CANTERBURY.]

THE OFFICE OF THE JUDGE PROMOTED BY NESBITT *v.* WALLACE.

Ecclesiastical Law—Officiating without Leave of Incumbent of Parish and contrary to Inhibition of Ordinary—Unconsecrated Building—Public Performance of Divine Service—Administration of Holy Communion—Canon 71 of 1603—Collection of Offertory Alms—Preaching—The Church Discipline Act, 1840 (3 & 4 Vict. c. 86)—Monition—Costs.

It is an ecclesiastical offence under the Church Discipline Act, 1840, for a clerk in Holy Orders of the Church of England to publicly perform any of the services of the Church of England without lawful authority in a parish without the consent and against the express wish of the incumbent of the parish, and such offence is aggravated where the accused clerk has in so acting disobeyed the inhibition of the Ordinary.

The articles in a criminal suit instituted in the Court of Arches by virtue of letters of request under the Church Discipline Act, 1840, charged the respondent, a clerk in Holy Orders of the Church of England, with having offended against the laws ecclesiastical by having on several specified occasions, in an unconsecrated building in the parish of which the promoter was the incumbent, within two years then last past, without the consent and contrary to the expressed wish of the promoter, and notwithstanding an inhibition of the archbishop of the diocese against the respondent performing any service of the Church in the diocese, read prayers, preached, and performed ecclesiastical duties and divine offices according to the rites and ceremonies of the Church of England. The respondent did not oppose the admission of the articles, but pleaded (inter alia) that there had been no public administration of the services of the

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(1) [1894] P. 172.

(2) Upon the petition for permanent maintenance, as to which no contest arose, the respondent was ordered to pay 100*l.* a year for the petitioner and 50*l.* a year for the two children.

Church of England in the building wherein he was charged to have officiated.

At the hearing it was admitted that the respondent had administered the Sacrament of the Lord's Supper in a building not being a private chapel dedicated and allowed by the laws ecclesiastical, and it was proved that on the occasions specified the respondent had conducted the services of the Church of England in the building mentioned in the articles in the presence of the owner of a lease for years of the property on a portion of which the building was built, of members of his family and household, and of other persons, either his undertenants or admitted to be present by his permission, and that at some of such services the respondent had collected offertory alms and delivered addresses to those present; all these acts having been done contrary to the expressed wish of the promoter, and some of them after the service on the respondent of the inhibition of the archbishop of the diocese.

The Dean of Arches being of opinion that the defence of the respondent had not been made out, pronounced that the articles had been sufficiently proved, admonished the respondent from offending in the like manner in the future, and condemned him in the costs of the suit.

THIS was a criminal suit at the voluntary promotion of the Rev. Joseph John Nesbitt, vicar of the vicarage and parish church of St. Nicholas, Rodmersham, in the county of Kent and the diocese and province of Canterbury, against the Rev. William Baillie Wallace, clerk in Holy Orders, perpetual curate of the parish of Lannarth, or Lenner, in the county of Cornwall and the diocese of Truro. It was commenced in this Court by virtue of letters of request signed and sealed by the Bishop of Truro in the first instance, under s. 13 of the Church Discipline Act, 1840, without the issue of any preliminary commission, and, the Dean of Arches having accepted the letters of request, a decree by letters of request issued in the usual form on the 19th of April last, citing the Rev. W. B. Wallace to appear and answer to articles to be administered to him . . . more particularly "for having since the 2nd day of December, 1900, without the leave and contrary to the express injunctions of the said Rev. J. J. Nesbitt, officiated as a clergyman of the Church of England in an unconsecrated building known as the parish room, Rodmersham Green, situate in the parish of Rodmersham aforesaid, and performed therein the offices of the Church to divers parishioners of the said parish, and for having upon each successive Sunday since the service upon

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him of a certain inhibition made against him on or about the 17th day of January, 1901, by the Archbishop of Canterbury performed the service of the Church in the said parish room in the said diocese in contempt and disregard of the said inhibition, and by reason of the premises having caused grave and just scandal and offence to the parishioners of the said parish, contrary to the canons and to the laws ecclesiastical of this realm."

An appearance in the cause was entered on behalf of the Rev. W. B. Wallace, and articles on behalf of the promoter were filed. These articles, after allegations to the effect that the respondent then was and had been for many years past a priest of the Church of England, having been instituted to the perpetual curacy of Lannarth, or Lenner, in the county of Cornwall, on or about the year 1879; that the promoter, the Rev. J. J. Nesbitt, had, on June 21, 1898, been instituted into the vicarage of St. Nicholas, Rodmersham, and on July 30, 1898, was inducted into the same parish, and had ever since been and still was the vicar of the said parish, and as such vicar was entitled to the sole cure of souls in the said parish and (art. 4) that the parish room, Rodmersham, was an unconsecrated building theretofore used for secular purposes connected with the parish, and for a long time used as a club-room of a village club, set forth (arts. 5 to 9) substantially in the following terms the offences which the respondent was alleged to have committed after a notice given by the promoter on December 2 and the service of the inhibition of the Archbishop of Canterbury referred to in the citation :—

"(5.) On Sunday, the 2nd December, 1900, between the hours of ten and eleven in the morning, the said J. J. Nesbitt met you outside the said parish room, and, having informed you that he was the vicar of Rodmersham, handed to you a written notice, of which the following is a copy :—

"'Rodmersham Vicarage, Sittingbourne.
"'1 December, 1900.

"'I am informed by parishioners of mine that you have been engaged to perform divine service in a building known as the

parish room, situate in Rodmersham, in my parish. The said services are about to be held against my wish and without my consent as incumbent of the parish of Rodmersham. I hereby give you notice that should you persist in holding any service, or performing any duty in the said room or elsewhere in my parish, I shall place the matter in the hands of my solicitor forthwith.

"'J. J. Nesbitt, M.A., Vicar of Rodmersham.

"'To the Rev. the Officiating Minister at the parish room, Rodmersham Green.'

"(6.) Having received the said notice and been made aware of the contents thereof, you then and there stated to the said vicar that you were willing to take the responsibility of holding the services in the said parish room, and being then asked by the said vicar whether you were licensed by the Archbishop of Canterbury, replied (as was in fact true) that you were not so licensed, but that you were prepared to officiate.

"(7.) Notwithstanding the premises in the aforesaid articles mentioned, you did on the said 2nd December, 1900, and have on every subsequent Sunday, taken upon you to read prayers, preach, administer from time to time (that is to say, once in every month) the Holy Sacrament of the Lord's Supper, and perform ecclesiastical duties and divine offices according to the rites and ceremonies of the Church of England in the said building in the said parish of Rodmersham without the leave and contrary to the said express injunction of the said Rev. J. J. Nesbitt.

"(8.) The Right Honourable and Most Reverend the Archbishop of Canterbury, upon representation made to him did, by an instrument in writing under his hand and episcopal seal and bearing date on about the 17th January, 1901, inhibit you the said W. B. Wallace from performing any of the services of the Church within the diocese of Canterbury, and such inhibition was duly served upon you on the 22nd January, 1901.

"(9.) Each of the said matters and things charged against you, the said W. B. Wallace, in the seventh of these articles hereinbefore set forth as having been committed since the date of

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the service upon you of the said inhibition, have been committed not only without the leave and contrary to the expressed injunctions of the said Rev. J. J. Nesbitt, but contrary to and in spite of the aforesaid inhibition of the said Archbishop of Canterbury, and in contumacious disregard of such inhibition and obstinate disobedience thereto."

The articles concluded by praying that, on proof of the premises so far as in law might be necessary, the Court would pronounce that the said W. B. Wallace had offended against the law ecclesiastical in the particular matters alleged, some one or more or all of them, and that he might be deprived of all his ecclesiastical promotions within the province of Canterbury, and especially of the perpetual curacy of Lannarth, or Lenner, aforesaid, and of and from the glebe fruits, &c., belonging to the said promotion, or might be otherwise duly and canonically punished according to the gravity of his offence and the exigency of the law, and be condemned in the costs thereby incurred on the part and behalf of the said J. J. Nesbitt, and compelled to the due payment thereof.

The admission of the articles was not opposed, and the solicitors for the respondent having given a negative issue thereto, subsequently brought in a responsive plea which denied the service upon the respondent of the inhibition of the Archbishop of Canterbury referred to in the articles, and pleaded in the second and third paragraphs thereof (inter alia) as follows :—

" (2.) The room at Rodmersham in which it was alleged that the said W. B. Wallace improperly ministered was not a public room, as alleged in the fourth article, but is the private property of one Robert Mercer who was using the same as a private chapel. The alleged ministrations of the said W. B. Wallace were not public.

" (3.) The said W. B. Wallace has no intention of administering the Sacrament of the Lord's Supper at Rodmersham in the future. The said W. B. Wallace has not at any time, and especially not since the date of the said inhibition, publicly read prayers or preached or performed ecclesiastical duties and

divine offices in the said parish of Rodmersham. The alleged administrations of the said W. B. Wallace have only been to the members of the said Robert Mercer's household or his visitors or dependants meeting for religious worship in the said private chapel of the said Robert Mercer, as mentioned in the second paragraph hereof."

July 30. The cause now came to be heard before the Dean of Arches (Sir Arthur Charles).

The promoter and three other witness were examined orally in support of the articles, and one witness, Mr. Robert Mercer, the leaseholder for years of a house in the parish of Rodmersham called Rodmersham Hall, gave evidence on behalf of the respondent. It appeared from the evidence of these witnesses that the respondent had been engaged by Mr. Mercer to officiate as a clergyman of the Church of England in the room on Rodmersham Green referred to in the articles, and known as the parish room, which stood on a portion of the estate held by Mr. Mercer together with Rodmersham Hall, and that the services held there by the respondent, at some of which the respondent had collected offertory alms and delivered addresses to those present, had been usually attended by a congregation of about twenty to thirty people, this congregation consisting of Mr. and Mrs. Mercer, of members of their family and household, of choir-boys, and of other persons—either Mr. Mercer's undertenants, or admitted to be present by his permission. The result of the evidence on this and other portions of the case is further stated in the judgment.

In the course of the case the counsel for the respondent admitted that the room where the respondent had officiated was not a private chapel dedicated and allowed by the ecclesiastical laws; that on successive Sundays between December 1, 1900, and July 22, 1901, with one or two exceptions when other clergymen attended, the respondent had officiated as a clergyman of the Church of England at Rodmersham Green in the room above mentioned; that whenever he had so officiated he had there read the Morning and Evening Services of the Church, and also had on two Sundays in each

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month administered the Sacrament of the Lord's Supper in the room in question contrary to the 71st canon of the Canons of 1603. (1)

Hansell, *A. J. Ashton*, and *Macklin*, for the promoter. The offences the respondent is charged with in the articles have all of them been decided to be undoubted offences against ecclesiastical law: *Barnes* v. *Shore* (2); *Freeland* v. *Neale* (3); *Richards* v. *Fincher* (4); *Liddell* v. *Rainsford* (5); and one of them, namely, the administration of the Sacrament of the Lord's Supper in the unconsecrated building where the respondent is charged to have officiated—a building in no sense a private chapel dedicated and allowed by the ecclesiastical laws—was admittedly an infringement of the 71st canon of the Canons of 1603, in respect of which the respondent alleges no defence at all. With respect to the rest of the offences charged against him, the respondent raises two defences, first, that the inhibition of the Archbishop of Canterbury inhibiting him from performing any service of the Church in the diocese was never duly served; and, secondly, that the performance of the services of the Church by the respondent were never in public, but always in an unconsecrated building, which can rightly be described as the private chapel of the leaseholder of the property on which it stood, and to which no members of the public were ever admitted.

(1) Canon 71 of the Canons of 1603 provides as follows: "No minister shall preach or administer the Holy Communion in any private house, except it be in times of necessity, when any being either so impotent as he cannot go to the church, or very dangerously sick, are desirous to be partakers of that Holy Sacrament, upon pain of suspension for the first offence, and excommunication for the second: Provided that houses are here reputed for private houses, wherein are no chapels dedicated and allowed by the ecclesiastical laws of this realm. And provided also under the pains before expressed that no chaplains do preach or administer the Communion in any other places but in the chapels of the said houses; and that also they do the same very seldom upon Sundays and holidays; so that both the lords and masters of the said houses and their families shall at other times resort to their own parish churches, and there receive the Holy Communion at the least once every year."

(2) (1846) 1 Roberts, 382.

(3) (1848) 1 Roberts, 643; 6 Notes of Cases, 252.

(4) (1874) L. R. 4 A. & E. 255.

(5) (1867) 37 L. J. (Ex.) 83.

Neither of these defences can be substantiated. The inhibition was personally served by the promoter, and it is clear on the authority of *Barnes* v. *Shore* (1) that the performance by the respondent of divine service and other ecclesiastical duties in the Rodmersham "parish room" must be held to have been public, and, being against the consent of the promoter and without the licence of the Ordinary, an illegal intrusion into the parish of the promoter. The services in the room in question were also public under the decision in the Sackville College case (*Freeland* v. *Neale* (2)).

The Court has undoubtedly jurisdiction to pronounce a sentence of deprivation in a proper case; but the promoter does not ask for that punishment, but only that the respondent may otherwise be canonically punished and condemned in the costs of the proceedings.

[They also referred to *Hodgson* v. *Dillon*. (3)]

Dibdin, K.C., *Holman Gregory*, and *W. J. H. Brodrick*, for the respondent. The facts of this case with respect to the respondent having officiated at Rodmersham during the last few months are not in dispute, and although the respondent has admittedly been guilty of an offence by having administered the Holy Communion contrary to the 71st canon of the Canons of 1603, it is contended that in whatever else he has done whilst so officiating he has not exceeded the liberty which is now, since the passing of 18 & 19 Vict. c. 86 in 1855, permitted to clergymen of the Church of England of performing the services of the Church in an unconsecrated building not open to the public. Too strict a view in favour of the incumbent of the parish was taken in *The Duke of Portland* v. *Bingham* (4) and the other cases as to proprietary chapels decided before 1855. In all these cases the terms public and private were used in very narrow senses, and the decisions there come to must now be read subject to the provisions of the Act of 1855, under which the test of whether a religious service is legally held in an unconsecrated building which is not certified is whether the building is substantially open to the

(1) 1 Roberts, 382.
(2) 1 Roberts, 643.
(3) (1840) 2 Curt. 388.
(4) (1792) 1 Cons. 157.

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public. The question, indeed, is not whether the respondent has officiated at Rodmersham without the leave of the promoter, but to whom has he officiated without that leave. The admission of the articles was not opposed, and it is not now open to the respondent to object that the performance of divine service by the respondent is not there alleged to have been public, but in fact his ministrations at Rodmersham were not open to the public, and if he only had officiated there to Mr. and Mrs. Mercer and the members of their family and household, no legal objection at all could have been taken by the promoter. That other persons, for the most part undertenants and dependants of Mr. Mercer, were present by especial permission ought not to render the proceedings unlawful, or otherwise than private. The promoter relies on *Barnes* v. *Shore* (1) as a conclusive authority in his favour; but in that case the administrations objected to were undoubtedly held in a public chapel—a certified building where the public were required to be admitted; so that the question whether the services were held in private did not really arise.

If the respondent's conduct cannot, however, be legally justified, the circumstances in which he was engaged to officiate in the parish room at Rodmersham, if brought to the notice of the Court, ought to go a long way in mitigation of the sentence to be pronounced on the respondent, and would shew that the justice of the case would be met by his being admonished, and, if condemned in costs at all, by his being only condemned in a sum nomine expensarum.

[The following authorities were also cited: *Carr* v. *Marsh* (2); *Smith* v. *Lovegrove*. (3)]

THE DEAN OF ARCHES (SIR ARTHUR CHARLES). This is, in my opinion, a clear case. It has been very fully put before me both on the part of the promoter and on the part of the respondent, and I am unable to entertain any doubt as to what my decision should be. I am sorry in some respects to have to pronounce that decision, because it is unfortunately obvious

(1) 1 Roberts, 382. (2) (1814) 2 Phillim. 198.
(3) (1755) 2 Lee, 162.

from the examination and cross-examination of Mr. Nesbitt, the promoter, on the one hand, and Mr. Robert Mercer on the other, that this parish is not one of those where the clergyman and his parishioners are in accord, and where they are simply helping one another forward in the work of religion. On the contrary, it has been proved to me that for some reason or other into which I cannot go and upon which I express no opinion, a large number of householders who reside in this parish have presented a petition of inquiry to the Archbishop of Canterbury, which is still depending and as to the merits of which I say nothing: for although a good many questions have been put to Mr. Nesbitt and to Mr. Mercer about the condition of the parish, nothing has been brought before me to enable me to form a judgment one way or the other upon disputes which unfortunately exist there.

There has also been, as I am informed by the promoter, a litigation going on between Mr. Mercer and Mr. Nesbitt in the Common Law Courts. With regard to that litigation I have only to observe that the issues raised on the record in the Arches Court are totally apart from any result which may be eventually arrived at in the common law dispute between Mr. Nesbitt and Mr. Mercer.

Now, Mr. Wallace, the respondent, is charged with two offences. He is charged with having officiated in the parish room of Rodmersham contrary to the wish and without the consent of the promoter; and, secondly, he is charged with doing so notwithstanding the inhibition of the Archbishop of Canterbury, who is the diocesan of the parish of Rodmersham.

The responsive allegation raises three points. First, it is said that the inhibition was not duly served; and, secondly, it is said that there has been no public ministration of the services of the Church of England within the limits of the parish. Thirdly, with regard to the charge of having administered the Sacrament in this parish, the respondent admits that he has no answer, because the 71st canon of 1603 is applicable to the case, and that canon distinctly provides that no minister shall administer the Holy Communion in any private house except it be in times of necessity, "when any being either so impotent

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as he cannot go to the church, or very dangerously sick, are desirous to be partakers of that Holy Sacrament." He is unable to bring the administration of the Holy Communion in this room within the circumstances under which it could lawfully take place in a private house or in a private chapel dedicated and allowed by ecclesiastical law. So far, therefore, the articles were proved, and Mr. Dibdin offered no defence of the respondent's conduct.

That leaves the two other defences untouched, namely, that the inhibition of the Archbishop of Canterbury was not duly served; and, secondly, that the ministrations of the respondent were not conducted in public.

With regard to the service of the inhibition, it does not rest on the same ground as the service of the letter of the incumbent. As to the latter, it is quite clear that on December 2 last Mr. Nesbitt, the promoter and the vicar of Rodmersham, informed Mr. Wallace that the services about to be held in the parish room upon that day were against his wish and without his consent. There is no question about that, and no question of service arises with regard to that document; but as to the inhibition of the archbishop the question does arise: it is said that this inhibition was not properly served. I have heard the evidence, and I was told there was going to be some contradiction of it; but there has been none, and I am satisfied that the inhibition was properly and duly served on January 22 last. [THE DEAN OF ARCHES referred at length to the evidence on this point, and continued:—]

Now, how does the matter stand? In this room at Rodmersham, from and after the day when that inhibition was duly served, Mr. Wallace had two obstacles against his officiating: he had been prohibited by the incumbent of the parish, and there is no point clearer in ecclesiastical law than that under the general provisions of that law the incumbent of any parish has the right to prevent any one publicly officiating in his parish without his consent; and, secondly, he was under the inhibition of the Archbishop of Canterbury. That is very important as regards the gravity of the offence, because it is

one thing to officiate against the consent of the incumbent, and another thing to officiate against the consent of the incumbent and also against the order of the archbishop. However, from January 22 last, with one exception, on one Sunday, when the service was taken by another clergyman, Mr. Wallace continuously until the end of last month took upon himself to minister as a clergyman of the Church of England in this building, and upon the first and third Sundays in the month to administer the Holy Communion. And he now says by way of defence: "Though I administered the Sacrament of the Holy Communion, and I was wrong because it is against the provisions of the 71st canon, yet with regard to my ministrations in general I was in the right, because although I ministered, my ministrations were not public, but private, and anybody is entitled to read the prayers of the Church of England privately in any parish without the consent of the incumbent of that parish." That leads me to the inquiry whether these ministrations were public or private; and on that point I am guided by two decisions of the Court of Arches, in the cases of *Barnes* v. *Shore* (1) and *Freeland* v. *Neale*. (2) In *Barnes* v. *Shore* (1) Sir Herbert Jenner Fust said: "By 'publicly reading' I understand a reading to those who are present in a church or chapel. That strangers were admitted into this chapel appears from the evidence of Field, Huxham, and Gould; the two latter, as strangers, attended the service. I say then that Mr. Shore did *publicly* read the prayers to those present in the chapel;—that this was not a reading *in a private house*, within the meaning of the 71st canon, as contended by Dr. Twiss. It was not the intention of the Canon that any place not consecrated or allowed by law should be considered *a private house*. By 'private house' is meant a dwelling-house where a family reside. I am well satisfied that this chapel was not a *private* chapel. It is clear from the evidence in the cause, that the chapel was open to any one who thought fit to attend the Services." That is what Sir Herbert Jenner Fust says in *Barnes* v. *Shore* (1) with reference to what is a "public"

(1) 1 Roberts, 382. (2) 1 Roberts, 643.

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service. Now clearly this room at Rodmersham was not a private house in the sense of being a dwelling-house; it was half a mile or a mile away from Mr. Mercer's dwelling-house, and the evidence shews that it was in fact a public room. It was used at one time as a working-men's club, afterwards as a mission room in connection with the church, or as a parish room. Then it was for a time rented as a fruit store from Mr. Mercer, and is in no sense a private dwelling-house. Nor is it a private chapel, because a private chapel is a chapel dedicated or allowed by ecclesiastical law, and this is not so dedicated or allowed. It is nothing more than a public room fitted up as a church or chapel. But then it is said that the public do not go there, and cannot go there, and that, therefore, to read the services of the Church of England there is not a *public* reading. I think that is a misapprehension of the word public in this connection. This appears clear from *Freeland* v. *Neale* (1), a case decided on the same ground as the case of *Barnes* v. *Shore*. (2) The learned judge in *Freeland* v. *Neale* (1), after observing that the assemblage in the Warden's Chapel at Sackville College could in no sense be regarded as a private family, says: "In *Barnes* v. *Shore* (2) I said, what I now repeat, that where two or three are gathered together who do not strictly form a part of a family there is a congregation, and the reading to them the services of the Church is a reading *in public*," and, as I understand, it does not matter how the congregation got there, whether by invitation or otherwise. What in the present case are the facts with regard to this point? Who attended the services in this room? First there were a number of persons, all of whom are members of the family or the household of Mr. Robert Mercer, and it may be that if those were the only persons who attended, the conduct of the respondent might have been justified, and I cannot help thinking that when Mr. Mercer went to the Archbishop of Canterbury, as the evidence shews he did, and told the Archbishop that he wanted to hold the services of the Church in a private chapel, that he must have given the archbishop to understand that what he was really asking for was a household

(1) 1 Roberts, 643. (2) 1 Roberts, 382.

or domestic service, and that such a service was the service with which the archbishop said that he certainly should not be disposed to interfere. But, however that may be, it is clear to my mind that when the inhibition was afterwards issued the true facts with reference to these services must have been brought to the attention of the archbishop, and it then turned out, to use Sir Herbert Jenner Fust's language, that more than two or three were gathered together who did not form part of a family, that there were other classes of persons who attended, and that therefore there was a congregation, and the reading of the services was a "reading in public." If that is not the true meaning of the words "in public," I fail to see why anybody could not in a parish room or in a public hall hold a service such as was held in this room, and be able to say that it was a private service because only selected persons had permission to enter when the service was held. It is true that the people who attended the services in this case and were not members of Mr. Mercer's family were not so numerous as in *Barnes* v. *Shore* (1), and were either his tenants or admitted to be present by his permission. But altogether there were a good many people belonging to these two classes present, and it seems to me impossible to hold that the attendance of such persons in the parish room can be accounted as an attendance of that domestic character which, in my opinion, is necessary to legalise the services held there.

I have come to this conclusion with some regret, because it is clear to me that for some reason or other the services of the parish church of this parish are not numerously attended; but the law that I have to deal with is a clear one, and leaves me, in my judgment, no alternative.

With regard to the punishment I ought to impose, the articles formally apply for the deprivation of Mr. Wallace from his office and benefice, or that he may otherwise be duly canonically punished according to the gravity of the offence, and they also ask that he should be condemned in costs. Now, although deprivation is no doubt a sentence which it is competent for me to pass in this Court, such a sentence is, in my opinion,

(1) 1 Roberts, 382.

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one which it would be quite improper to pass in this case. It has not indeed been asked to-day that I should do so; and I think that my course is prescribed for me by what was done in the case of *Barnes* v. *Shore*. (1) I shall accordingly pronounce the same sentence as was pronounced in that case: namely, that the articles are sufficiently proved; and I further admonish Mr. Wallace to abstain from offending in any like manner for the future in the parish of Rodmersham and diocese of Canterbury.

With regard to the costs, if I had been able to come to a different conclusion with regard to the inhibition of the Archbishop of Canterbury I might have taken a different course; but no matter what the particular circumstances of the parish are, I have before me the case of a beneficed clergyman who has been for months conducting services and administering the Holy Communion in this parish, contrary not only to the wishes of the vicar of the parish, but also to the inhibition of the diocesan. Under these circumstances my monition to him to abstain from further taking that course must be accompanied by the condemnation of him in the costs of these proceedings.

Solicitors for promoter: *Finney, Thomas & Co.*
Solicitors for respondent: *Trinder, Capron & Co.*

(1) 1 Roberts, 382.

C. F. J.

THE MERSEY.

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Nov. 4.

Admiralty—Practice—Transfer of Action from Inferior Court—Cross-action in High Court—Conduct of Action.

The rule laid down in *The Never Despair*, (1884) 9 P. D. 34—namely, that when an action is transferred from an inferior court and consolidated with a cross-action begun in the High Court, the plaintiffs in the action in the inferior court will be placed in the position of plaintiffs in the consolidated actions, if they began the action in the inferior court before the cross-action in the High Court—will not be followed unless there is clear priority in time, so that where the commencement of the two actions is practically simultaneous the action in the High Court will be treated as the principal cause.

MOTION by the Mersey Docks and Harbour Board, as owners of the *Miles K. Burton*, in an action of damage by collision against the corporation of Birkenhead, as owners of the *Mersey*, for an order to transfer to the Probate, Divorce, and Admiralty Division of the High Court, and consolidate an action brought against them by the corporation of Birkenhead in the Liverpool County Court in respect of the same collision, and that the action of the Mersey Docks and Harbour Board should be made the principal cause.

The facts were shortly as follows :—

On September 27, 1901, a collision occurred in the river Mersey between the steam hopper dredger *Miles K. Burton*, belonging to the Mersey Docks and Harbour Board, and the steam ferry-boat *Mersey*, belonging to the corporation of Birkenhead. The legal representatives of the parties having agreed that neither should take proceedings without notice to the other, the corporation of Birkenhead, on October 21, gave notice that they would proceed, and at 3.15 P.M. on that day they entered an action under the Admiralty jurisdiction of the Liverpool County Court against the owners of the *Miles K. Burton*, and by the particulars annexed to the plaint-note claimed 300*l.* damages in respect of the collision. On the same day at 3.50 P.M. the Mersey Docks and Harbour Board issued a writ out of the Liverpool District Registry of the High Court

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claiming damages (estimated at 500*l.*) against the owners of the *Mersey* in respect of the same collision. The acceptance of service of the summons in the county court, and of the writ in the High Court and the undertaking to appear, were practically simultaneous.

The present motion, so far as the transfer of the county court action and its consolidation with the High Court action were concerned, was not opposed.

Aspinall, K.C., and *Alexander D. Bateson*, for the Mersey Docks and Harbour Board, the owners of the *Miles K. Burton*, in support of the motion, urged that as the Mersey Docks and Harbour Board were plaintiffs in the High Court, and for a larger amount of damages, their action should be treated as the principal cause.

E. G. Hemmerde (*F. E. Smith* with him), for the Birkenhead Corporation, the owners of the *Mersey*, contra, contended that as the Birkenhead Corporation were the first to institute proceedings, they were entitled, in accordance with the practice settled in *The Never Despair* (1), to be placed in the position of plaintiffs when their action was consolidated with that of the High Court action, and that, if the question of the amount of damages were to influence the Court, it would lead to parties inflaming the claim so as to exceed the limit of the jurisdiction of the county court in order to proceed in the High Court and obtain the conduct of the cause.

THE PRESIDENT (SIR F. H. JEUNE). In this case two actions of damage have been commenced in respect of the same collision, one at 3.15 P.M. on October 21 in the Liverpool County Court, and the other at 3.50 P.M. on the same day in the High Court. The motion by the plaintiffs in the High Court for the transfer and consolidation of the county court action is not opposed except on one point, namely, that the plaintiffs in the High Court ask as part of the order that their action shall be treated as the principal cause.

I must decide this matter upon principle, although I do not

(1) 9 P. D. 34.

think that my decision, in the circumstances, will in any way affect the real interests of the parties concerned.

In *The Never Despair* (1) Sir James Hannen took in chambers what, with all respect to Sir Robert Phillimore, I think was the wiser course. He held that the action which was already in the High Court when the order of transfer was made must be deemed the principal cause, and that the plaintiffs in that suit should, therefore, have the conduct of the consolidated actions; but he found that Sir Robert Phillimore had in previous cases gone on the principle of priority of time (2), and on the matter being adjourned into court he varied his first decision. If, therefore, there is clear priority of time, I ought to follow Sir Robert Phillimore as did Sir James Hannen.

In the present case, no doubt, if I had to decide the matter absolutely as a jury and anything depended upon it, there would be some evidence to shew that the county court plaint was issued at 3.15 P.M., and the writ in the High Court action not till 3.50 P.M.; but, for practical purposes, I cannot regard the case as one in which either party commenced proceedings before the other; that is to say, I cannot attach sufficient importance to the times of 3.15 P.M. for the plaint and 3.50 P.M. for the writ to enable me to say that there is a clear priority of time which would or should give the advantage to one party or the other.

I think that the proper way to look at the matter is to treat the proceedings as if they had been taken simultaneously, which was evidently the intention of the parties, with the result that I am entitled to regard the matter as Sir James Hannen looked at it, namely, as a case in which one party is in the court already, and being so is entitled to the advantage, whatever it is, to have their action treated as the principal cause.

I agree that it would not be a safe principle to act upon in every case to give the advantage to the party making the larger claim; still it is the fact that the claim of the Mersey

(1) 9 P. D. 34.

(2) See *The Cosmopolitan*, (1874), pp. 35, 36 of *The Never Despair*, 9 P. D. 34. and *The Bjorn*, (1882), in the note at

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The President.

Docks and Harbour Board is larger than the claim of the Birkenhead Corporation, and I think the Dock Board should have the conduct of the consolidated actions. The costs of the motion will be costs in the cause.

Solicitors for Mersey Docks and Harbour Board: *Rowcliffes & Co., for W. C. Thorne, Liverpool.*

Solicitors for Birkenhead Corporation: *F. Venn & Co., for Alfred Gill, Birkenhead.*

T. L. M.

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DIVORCE—*Alimony Pendente Lite—Maintenance and Education of Children—Separation Agreement—Jurisdiction of Court—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 35—*Matrimonial Causes Act*, 1859 (22 & 23 *Vict. c.* 61), *s.* 4.

A wife, having petitioned for the dissolution of her marriage, presented a petition for an allowance by way of alimony pendente lite and for the maintenance and education of the children of the marriage. In answer to this petition the husband alleged that prior to the divorce petition he and his wife had entered into an agreement for separation, by which he had agreed to make her an allowance of 600*l.* a year. The wife denied the existence of the agreement:—

Held, that the agreement (if it existed) would not affect the jurisdiction of the Court under s. 35 of the Matrimonial Causes Act, 1857, and s. 4 of the Matrimonial Causes Act, 1859, to make provision for the maintenance and education of the children, and that the husband must make discovery of his means. BARRY *v.* BARRY
C. A. 87

2. —— *Costs — Co-respondent — Consolidated Suits—Jurisdiction—Appeal—Final or Interlocutory Order—Leave to Appeal—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 34—*Supreme Court of Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *s.* 5.

A wife having filed a petition for judicial separation, on the ground of her husband's cruelty, the husband afterwards filed a petition for dissolution of the marriage. An order was made for the consolidation of the two suits, and they came on for trial together. The wife's charge against the husband was withdrawn, there being no evidence in support of it; and her petition was dismissed. On the husband's petition a decree nisi was made for dissolution of the marriage, with costs and damages against the co-respondent, and the decree was afterwards made absolute:—

Held, that the consolidation order had not the effect of making the proceedings on the wife's petition part of the proceedings on the husband's petition, and that consequently there was no jurisdiction under s. 34 of the Matrimonial Causes Act, 1857, to order the co-respondent to the husband's petition to pay the costs of the proceedings on the wife's petition.

Decision of Jeune P. reversed.

The question whether the co-respondent could

DIVORCE—*continued.*

be ordered to pay the costs of the wife's petition arose upon the taxation of the costs under the final decree, and was referred by the registrar to the Court.

The President decided that there was jurisdiction under s. 34 to order the co-respondent to pay these costs:—

Held, that this order was part of the final decree, and that consequently an appeal against the order could be brought without the leave of the Court.

The City of Manchester, (1880) 5 P. D. 221, and *Marsden* v. *Lancashire and Yorkshire Ry. Co.*, (1881) 7 Q. B. D. 641, followed. FORBES-SMITH *v.* FORBES-SMITH AND CHADWICK **C. A. 258**

3. —— *Costs—Security for—Practice—Motion for New Trial—Divorce Petition—Supreme Court of Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *s.* 1 *—Rules of Supreme Court, Order* LVIII., *r.* 15.

The Court of Appeal will not order security to be given for the costs of a motion for a new trial of a divorce petition, it not having been the practice to require security to be given in such a case before the Supreme Court of Judicature Act, 1890.

Heckscher v. *Crosley*, [1891] 1 Q. B. 224, followed. RICKABY *v.* RICKABY AND SWIFT **C. A. 134**

4. —— *Delay—"Unreasonable Delay"—Respondent's Insanity—Decree.*

The hope or expectation operating in the mind of a husband, that he may be released from the matrimonial tie by the death of his wife, who, after committing adultery, has become insane, may be accepted as a valid excuse and explanation of what would otherwise be "unreasonable delay" in taking proceedings for the dissolution of the marriage. JOHNSON *v.* JOHNSON **Jeune Pres. 193**

5. —— *Desertion—"Reasonable Excuse"—Refusal of Wife to allow Marital Intercourse—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 27.

After a husband and wife had been for some years living apart by (as the Court held) mutual consent, the husband committed adultery:—

Held, that this was not evidence of desertion by him.

A wife who without cause refuses to permit marital intercourse to her husband cannot allege "desertion" by him "without reasonable excuse" if in consequence he refuses to live with her.

Decision of Jeune P., [1900] P. 180, affirmed. SYNGE *v.* SYNGE - - - **C. A. 317**

6. —— *Nullity—Decree Nisi—Intervention by King's Proctor—Motion by Petitioner to rescind Decree and dismiss Petition—Costs—Consent—Motion granted.*

Upon the petitioner's application—the King's Proctor, who had intervened and filed his plea, assenting—the Court (Jeune P.) rescinded a decree nisi for nullity of marriage and dismissed the petition.

No order for the King's Proctor's costs was made, he having waived his right to ask for the same. A. (OTHERWISE B.) *v.* A. (THE KING'S PROCTOR INTERVENING) - **Jeune Pres. 284**

DIVORCE—*continued.*

7. —— *Nullity—Impotence—Marriage Settlements—Petition for Variation—"Property Settled"—Matrimonial Causes Act*, 1859 (22 & 23 *Vict. c.* 61), *s.* 5—*Matrimonial Causes Act*, 1878 (41 & 42 *Vict. c.* 19), *s.* 3.

The jurisdiction of the Court, conferred by the 5th section of the Matrimonial Causes Act, 1859, and extended by the 3rd section of the Matrimonial Causes Act, 1878, to inquire into the existence of ante-nuptial and post-nuptial settlements, and to make orders varying the same, is not limited to any particular class of nullity cases, but includes all cases in which a decree of nullity has been pronounced, upon whatsoever ground.

Where, in a marriage settlement, property is charged in favour of the intended beneficiaries, the "property settled," within the meaning of s. 5 of the Matrimonial Causes Act, 1859, is the charge and not the property charged.

Where property is settled under a marriage settlement, conditionally on the happening of a future event, and the marriage has been pronounced to be void before the happening of the event, the Court cannot ignore the condition, and vary the settlement in respect of the property so settled.

By a marriage settlement the respondent, the intended husband, covenanted with trustees to pay to them, if the marriage should take place, a yearly sum of 200*l.*, in trust to pay the same to the petitioner, the intended wife, during the joint lives of husband and wife. He also, in virtue of certain powers vested in him, appointed in favour of the petitioner, if she should survive him, a jointure rent-charge, to be charged on certain specified hereditaments, and secured by a term of years to commence from his death. He also in exercise of powers vested in him appointed certain other hereditaments to the use of the trustees for a term of years, to raise a capital sum the interest of which was to be paid to him during life, and after his decease the fund was to be held in trust for the issue of the marriage, and in default of issue for the intended wife, but subject to the proviso that no part should be raised during his lifetime without his consent in writing. The marriage took place, but, on the petition of the wife, a decree of nullity of marriage was made on the ground of the impotence of the respondent. On an application by the petitioner to vary the settlement:—

Held, that, although the marriage had been declared void, and the covenant as to the payment of 200*l.* a year no longer took effect, the Court had jurisdiction under the Matrimonial Causes Act, 1859, on the application of the petitioner, to vary the settlement in respect of that settled property:

Held, also, that the Court would have had power to vary the settlement as to the jointure rent-charge, and the capital sum directed to be raised, on the ground that they were "property settled" within the meaning of the Matrimonial Causes Act, 1859, but for the conditions that the former was only to commence after the death of the respondent, and that the latter could not be raised in his lifetime without his consent, neither of which events had happened.

DIVORCE—*continued.*

Decision of Gorell Barnes J., [1900] P. 130, reversed. DORMER (OTHERWISE WARD) *v.* WARD
C. A. 20

8. —— *Nullity of Marriage—Non-consummation—Impotence presumed.*

From the fact of non-consummation of a marriage after a reasonable period of cohabitation, during which one of the parties was always willing and anxious and repeatedly urged that the marriage should be consummated, the Court may draw the inference that something more than seemingly mere wilful refusal must have animated the other party, who has in fact persistently refused to consummate the marriage, and has also refused to obey the usual order to attend for medical inspection. In such a case, the Court may properly assume the existence of some latent impediment amounting to incapacity.

The principle laid down by the Court (Jeune P.) in *F.* v. *P.* (*falsely called F.*), (1896) 75 L. T. 192, in the case of a female respondent, followed and extended to the case of a male respondent. B. (OTHERWISE H.) *v.* B.
Gorell Barnes J. 39

9. —— *Practice—Affidavit in verification of Petition—Proposed Petitioner for Judicial Separation an Inmate of an Asylum—Refusal by Commissioners in Lunacy to authorize access by Solicitor and Commissioner for Oaths — Motion — Order forthwith.*

A married woman, confined in an asylum, gave instructions to her solicitor to institute proceedings against her husband for judicial separation, and the solicitor attended with a commissioner for oaths, in order to obtain from the proposed petitioner the necessary affidavit in verification of the petition, which had been approved and signed by her previously.

The superintendent of the asylum, acting upon printed instructions purporting to be signed by the secretary and addressed from the Office of the Commissioners in Lunacy, refused to allow the solicitor and commissioner for oaths to see the proposed petitioner, and, upon application being made by the solicitor to the Commissioners in Lunacy, they upheld the refusal of the superintendent.

The Court, upon motion, and upon affidavit proving notice, made an order, the Commissioners in Lunacy having notice and not opposing, that the Commissioners should forthwith authorize the superintendent of the asylum to permit the solicitor and commissioner for oaths to have access to the proposed petitioner. *In re* PETITION FOR JUDICIAL SEPARATION. *Ex parte* BEECHAM
Jeune Pres. 65

10. —— *Practice — Damages — Verdict for Amount larger than that claimed in the Petition.*

Where in an undefended case damages are assessed at a higher figure than that claimed in the petition, a summons must be taken out by the petitioner (if he desire to amend his claim) asking for leave to amend and re-serve the petition.

The summons should be served upon the co-respondent, who, although not represented at the trial, will be entitled to be heard in opposition to the application. BECKETT *v.* BECKETT
Jeune Pres. 85

DIVORCE—*continued.*

11. —— *Practice—Death of Co-respondent after Suit Commenced—Motion to Strike out his Name—Order.*

When a co-respondent named in a petition dies after the commencement of the proceedings, the right form of application to be made by the petitioner is to strike his name out of the suit. WALPOLE *v.* WALPOLE - **Gorell Barnes J. 86**

12. —— *Practice—Particulars—Names of probable Witnesses—Order for Disclosure.*

Where in a petition by the wife against the husband he was, for the purpose of establishing cruelty, charged with using insulting language to her in the presence of servants and guests, with the object of humiliating and degrading her, the petitioner was ordered to give particulars, setting forth the names of such servants and guests. BISHOP *v.* BISHOP - - **Jeune Pres. 325**

13. —— *Practice—Petition filed but not served—Application for Commission—Evidence de bene esse—Costs.*

An order for a commission to take the evidence of witnesses out of the jurisdiction was made, at the risk and expense of the applicant, immediately after the petition had been filed and before there had been time to effect service. VALLENTINE *v.* VALLENTINE - **Jeune Pres. 283**

14. —— *Practice—Substituted Service of Citations and Petition—Respondent and Co-respondent resident in Lisbon—Portuguese Law—Letters of Request Refused—Service by Registered Letters.*

Where, upon a citation and petition for dissolution of marriage, it appeared that the respondent and co-respondent were known to be residing at certain addresses in Portugal, the Court, after letters of request had been applied for and refused, dispensed with personal service and ordered substituted service to be effected by registered letters. WRAY *v.* WRAY AND D'ALMEIDA.
Gorell Barnes J. 132

15. —— *Practice — Summary Jurisdiction (Married Women) Act,* 1895 (58 & 59 *Vict. c.* 39) *—Income of Husband and Wife—Computation—Voluntary Allowance.*

In estimating the respective incomes of a husband and wife upon a matter arising under the Summary Jurisdiction Act, 1895, a voluntary allowance is to be taken into account. NOTT *v.* NOTT - - - - - **Div. Ct. 241**

16. —— *Prostitution—Wife's Petition—Queen's Proctor's Intervention—Wife forced by Husband to earn Money by Prostitution—Separation—Habitual Adultery subsequent to Separation—Husband's former Misconduct conducive to such Adultery—Matrimonial Causes Act,* 1857 (20 & 21 *Vict. c.* 85), *s.* 31*—Discretion of Court—Decree made Absolute.*

Upon an intervention by the Queen's Proctor after the petitioner had obtained a decree nisi for the dissolution of her marriage on the ground of the adultery and cruelty of her husband, it appeared that he had by his threats and ill-treatment forced her to prostitute herself for his pecuniary benefit, and that she, after she had left him on account of his continued ill-treatment, resorted to other acts of prostitution to supplement her insufficient means of livelihood, and

DIVORCE—*continued.*

also cohabited for a period of three years with a certain man as his wife:—

Held, that all her subsequent acts were the outcome of the husband's conduct, and that she was entitled to have the decree which she had obtained made absolute; the three years' cohabitation and some other facts, very material to be considered by the Court and such as ought not to have been withheld at the hearing of the petition, being insufficient to bar the wife's claim to have her marriage dissolved on the grounds of her husband's adultery and cruelty, though amply sufficient to warrant and justify the intervention of the Queen's Proctor.

Symons v. *Symons*, [1897] P. 167, discussed. BURDON *v.* BURDON - - **Gorell Barnes J. 52**

17. —— *Restitution of Conjugal Rights—Service out of the Jurisdiction—Decree.*

A citation and petition in a suit for restitution of conjugal rights, as well as the previous letter of demand required by the rules, may now be served out of the jurisdiction; and where a decree is granted, the decree may likewise be served out of the jurisdiction.

In any further proceedings arising out of a non-compliance with the decree, the petitioner must satisfy the Court that the respondent has been served therewith at a place from which he could reasonably have returned to his wife within the period named in the decree. BATEMAN *v.* BATEMAN - - - **Gorell Barnes J. 136**

18. —— *Settlements, Variation of—Interests of Next of Kin—Petition to order Reconveyance of Settled Property to Petitioner—Refusal.*

By a settlement on his marriage with the respondent the petitioner settled certain property upon trust to pay the income to himself until he should alienate, or attempt to alienate, his interest therein, or until some event should occur whereby the income should become payable to some one other than himself, or until his death, whichever should first happen. The second interest was given to the respondent for her life or widowhood, and (there being no children of the marriage) there was an ultimate trust in favour of the next of kin of the petitioner, but this ultimate trust was only to take effect after the death of the respondent if she should have married again and again become a widow.

In 1899 the petitioner gave a certain undertaking in the Chancery Division to the effect that he would apply forthwith to vary the settlement so as to vest the remainder of the settled property in himself absolutely, and that he would in any event give a charge over all his interests under the settlement. After the decree absolute the petitioner contracted a second marriage, and at the present time, were he to die, the persons entitled to share in his estate under the Statute of Distributions would be the second wife, the mother, and a nephew and niece of the petitioner, the last two being also beneficially interested in the mortgage of his interest in the settled property.

Upon motion to confirm the registrar's report upon the petition to vary the settlement and to order the reconveyance of the settled property to the petitioner absolutely:—

DIVORCE—*continued.*

Held, distinguishing *Meredyth* v. *Meredyth and Leigh*, [1895] P. 92, and *Wynne* v. *Wynne*, (1898) 78 L. T. 796, that this would be going too far, and that the right order to make was simply to extinguish the respondent's interests in the settlement, so that, subject to the engagement given by the petitioner in the Chancery Division, the petitioner's resulting life interest in the settled property would become operative. WALPOLE *v.* WALPOLE AND GODDARD **Jeune Pres. 196**

19. —— *Settlements, Variation of—Jurisdiction—Meaning of "Settlement"—Absolute Assignment by Husband to Wife—Matrimonial Causes Act*, 1859 (22 & 23 *Vict. c.* 61), *s.* 5.

A husband executed a deed by which he assigned to a trustee a leasehold house and some furniture, upon trust to assign the same at once to the wife absolutely, and the trustee assigned the same accordingly. The wife afterwards obtained a decree of nullity of marriage:—

Held, reversing the decision of the President, that the assignment was not a "settlement" within s. 5 of the Matrimonial Causes Act, 1859, and that the Court had no jurisdiction to vary its provisions.

Chalmers v. *Chalmers*, (1893) 1 R. 504; 68 L. T. (N.S.) 28, approved. HUBBARD *v.* HUBBARD **C. A. 157**

20. —— *Settlements, Variation of—Power of Appointment upon Petitioner's Second Marriage—Children's Reversionary Interests affected—Extinguishment of Respondent's Interests—Principle of quid pro quo—Matrimonial Causes Act*, 1859 (22 & 23 *Vict. c.* 61), *s.* 5.

The Court has power to vary a marriage settlement so as to deprive infant children of the marriage of part of their interests secured to them by such settlement.

Where a marriage settlement gave the petitioner (wife) power to appoint, after the death of the respondent, in favour of a second husband and the children of a second marriage, the Court, recognising the principle of quid pro quo in such cases, gave to the petitioner power so to appoint, during the respondent's lifetime, a portion of the fund which had been settled for the ultimate benefit of the children of the marriage, upon the ground that the extinguishment of the respondent's interests being part of the order would, while depriving them of that portion, accelerate their interests in the remainder. WHITTON *v.* WHITTON - - - **Jeune Pres. 348**

ECCLESIASTICAL LAW—*Faculty—Grant of Faculty for Erection of Communion Table in Side Chapel—Insertion in Faculty of Proviso reserving Power to the Court to order the Removal of Communion Table so authorized if Ornaments introduced into the Chapel without a Faculty or unlawful Services performed there.*

A faculty was granted on the application of the rector of a parish for the erection and use of a second Communion Table in a side chapel of the parish church, though both the churchwardens of the parish and the parish vestry expressed opinions averse to the grant, but the Court directed that a proviso should be inserted

in the faculty reserving to the Court, on being satisfied that ornaments other than those sanctioned by the present or any future faculty had been introduced into the chapel or unlawful services performed there, to order the removal of the second Communion Table from the chapel. RECTOR OF ST. ANNE'S, LIMEHOUSE *v.* PARISHIONERS OF SAME - **Consist. Ct. of London 73**

2. —— *Faculty—Interest—Parishioner of new Ecclesiastical Parish — Lord Blandford's Act* (19 & 20 *Vict. c.* 104), *s.* 15—*Right of Non-resident Ratepayer to promote Faculty Suit—Removal of Illegal Ornaments—Stations of the Cross—Confessional Boxes—Crucifixes—Tabernacles—Holy Water Stoups—Images of the Good Shepherd, the Virgin Mary and the Sacred Heart and St. Joseph—Effect of Sentence of Consecration—Criminal Suits against Churchwardens—Issue of Decree—Costs.*

The tenant of a house within the limits of an ecclesiastical district formed into a separate parish with a new parish church under Lord Blandford's Act, who has his name on the rate-book of the civil parish out of which the separate parish has been formed, and pays the civil parochial rates levied on him, has a sufficient interest to promote a faculty suit for the removal of illegal ornaments set up in the new parish church, notwithstanding that he does not reside in the ecclesiastical district and has become tenant of the house for the sole purpose of qualifying as a parishioner and ratepayer.

A Bishop cannot by a sentence of consecration legalize the retention in a parish church of an ornament which is forbidden by law to be there.

The following ornaments and things were ordered by the Ordinary to be removed from a parish church as illegal :—

I. ORNAMENTS AND THINGS IN THE CHURCH AT THE TIME OF ITS CONSECRATION.

I. The fourteen Stations of the Cross. II. Three Confessional Boxes. III. A large Crucifix fixed near the pulpit. IV. A Tabernacle on the Communion Table in the chancel before which a lamp was kept burning.

II. ORNAMENTS AND THINGS INTRODUCED INTO THE CHURCH SINCE ITS CONSECRATION.

I. A piece of furniture applicable for receiving Confessions. II. Two Water Stoups for holding Holy Water. III. A Tabernacle on the Communion Table in the side chapel of the church used for the Reservation of the Sacrament. IV. Images representing (1.) the Good Shepherd, on a pedestal at the west end of the church, with candles on each side and a lighted lamp in front; (2.) the Virgin Mary, on a pedestal standing against the chancel screen with candles on each side, vases of flowers, and a lighted blue lamp before it with canopy, crown, and star over it; (3.) the Sacred Heart and St. Joseph, on either side of the Communion Table in the side chapel of the church. V. Several Crucifixes, one over the Communion Table in the chancel, another on the chancel screen, and another with a crown over it over the Holy Table in the side chapel of the church.

The patent appointing the Chancellor of the Diocese of Chichester confers on him jurisdiction to proceed in the absence of the Bishop of the diocese from the Consistory Court of Chichester in all ecclesiastical suits, the decision of which is known by law or custom of the realm to belong to the Ecclesiastical Courts, and finally to decide and determine them without breach of the laws and statutes of the kingdom, "nevertheless first consulting us" [the Bishop of the diocese] "and our successors, and having our consent, in case either party earnestly craves our judgment."

The opponents in a cause of faculty instituted in the Consistory Court of Chichester for the removal of certain ornaments out of a parish church alleged in their answer that before any decision or final determination of the cause, the Bishop of the diocese should be first consulted and his consent had, and earnestly craved his judgment in the premises, and complained and supplicated that the said Bishop should examine and determine the cause in his own proper person in the Consistory Court of the diocese. The petitioner in his reply submitted that the consent of the Bishop prayed for in the answer was not necessary to the hearing and determination of the cause, and supplicated that the said cause might be examined and determined by the Chancellor of the diocese. Subsequently the hearing of the cause took place in the Consistory Court of Chichester.

The Chancellor of the diocese heard the cause sitting alone, the Bishop not being present, and determined it, delivering judgment without consulting the Bishop, and decreeing a faculty to issue for the removal of the illegal ornaments referred to in the petition, holding that the validity of the reservation in his patent in favour of the Bishop was a matter for the determination of the temporal Courts; it being within the province of these Courts alone to decide whether a custom for the Bishop to exercise the right reserved to him by the patent was valid in law.

Semble, the custom in question, i.e., a custom for the Bishop to veto a judgment come to after the hearing of a suit by the Chancellor, would be unreasonable and bad in law and not a legal custom, as no trace of its exercise could be found in recent times or since the Reformation.

Observations as to the institution of criminal suits against churchwardens for the purpose of obtaining the removal of illegal church ornaments. DAVEY *v.* HINDE

Consist. Ct. of Chichester 95

3. —— *Faculty—Jurisdiction—Chancel Screen with Crucifix and Figures of the Virgin Mary and St. John—Architectural Adornment not shewn to be probably open to Abuse—Admission of Fresh Evidence on Appeal—Retention of Cause.*

A chancel screen to the upper portion of the tracery of which is attached over the entrance archway the figure of Our Lord upon the Cross, and on one side of the archway the figure of the Virgin Mary, and on the other side the figure of St. John, is not either from its character or position in itself unlawful in churches or chapels of the Church of England, and may be authorized by faculty, provided the Ordinary is of opinion in

ECCLESIASTICAL LAW—*continued.*

his discretion that it is not probable that the figures on it will be abused for superstitious purposes.

The mere suggestion that the figures on the screen may cause offence is not a sufficient reason for the Ordinary refusing in his discretion to grant the faculty.

The vicar and churchwardens of a parish church in the diocese of London and the chapelwardens of a chapel of ease in the parish petitioned for a faculty to authorize the erection in the chapel of a chancel screen of oak with the figure of Our Lord on the Cross upon the centre of it, and the figure of the Virgin Mary upon one side and St. John on the other: the figures not to surmount the screen, but to be attached to the upper portion of the tracery, the central figure immediately over the entrance archway, and the other two figures, one on the right and one on the left, at a somewhat less elevation, upon pedestals affixed to the woodwork. The grant of the faculty was unopposed, and no evidence was given as to whether the figures on the screen would or would not be likely to be abused by superstitious reverence. The Chancellor of the Diocese of London refused to grant a faculty for the figures on the proposed screen, being of opinion that the erection of a chancel screen with the figures as proposed was illegal in itself under the ruling of the Arches Court and the Privy Council in *Clifton* v. *Ridsdale*, (1876) 1 P. D. 316; (1877) 2 P. D. 276. The petitioners appealed to the Arches Court.

The Dean of Arches at the hearing of the appeal admitted fresh evidence as to the mode in which the services in the chapel were conducted, and, finding that there was nothing in them to lead the Court to suppose that the proposed screen and figures were likely to be treated otherwise than as an architectural decoration, allowed the appeal, retained the cause, and ordered the faculty as prayed to issue from the registry of the Arches Court. *In re* ST. ANSELM, PINNER - - **Arches Ct. of Canterbury 202**

4. —— *Faculty — Jurisdiction — Faculty for Removal of Remains from Consecrated to Unconsecrated Ground subject to Grant of Licence from Secretary of State—Evidence—Discretion — The Burial Act*, 1857 (20 & 21 *Vict. c.* 81), *s.* 25—4 & 5 *Will.* 4, *c. lxxv.*

The 25th section of the Burial Act, 1857, provides that, except in the cases where a body is removed from one consecrated place of burial to another by faculty granted by the Ordinary, it shall not be lawful to remove any body or the remains of any body which may have been interred in any place of burial without licence under the hand of one of Her Majesty's Secretaries of State.

The superior of St. Edmund's College—one of the Roman Catholic theological colleges in England—applied to the Court for a faculty to authorize the removal of the remains of a former superior of the college from their place of interment in a vault in the churchyard of a parish church in the diocese of London to a vault under the chapel of the college wherein three of the predecessors of the petitioner and the deceased lay buried. It appeared that the owner of the vault from which it was proposed to remove the remains of the deceased could not be discovered, but that the incumbent of the parish church in whom the freehold of the churchyard was vested and the next of kin of the deceased consented to the proposed removal. No evidence was given that the vault under the college chapel had ever been consecrated.

The Court in its discretion granted the faculty; but, being of opinion that the vault under the college chapel was not a consecrated place of burial within the meaning of the above section, directed that the faculty should issue upon condition that it was not to be acted upon until a licence approving the place of reinterment had been obtained from a Secretary of State.

The removal of remains from unconsecrated places of burial being by the above section placed under the control of a Secretary of State, the Court cannot now, as it would have done before the passing of the Burial Act, 1857, refuse to exercise whatever jurisdiction it might possess to grant a faculty for the removal of remains to unconsecrated ground on account of the objection that the remains when removed would not be sufficiently protected from disturbance. *In re* TALBOT - - - **Consist. Ct. of London 1**

5. —— *Jurisdiction—The Clergy Discipline Act*, 1892 (55 & 56 *Vict. c.* 32), *s.* 2—*Charge of having been "Convicted by a Temporal Court of having committed an Act constituting an Ecclesiastical Offence"—Conviction by Magistrates of Indecent Behaviour in a Church of the Church of England during Divine Service—The Ecclesiastical Courts Jurisdiction Act*, 1860 (23 & 24 *Vict. c.* 32), *s.* 2—*Brawling—Evidence—Monition.*

Indecent behaviour of a clergyman in a church of the Church of England during the celebration of divine service, though punishable by magistrates under the Ecclesiastical Courts Jurisdiction Act, 1860, is an offence against the general ecclesiastical law.

The Consistory Court of the diocese within which a clergyman holds preferment has jurisdiction under the 2nd section of the Clergy Discipline Act, 1892, to try and sentence him under that Act in case he is convicted by a temporal Court of having committed an act constituting an offence against ecclesiastical law, not being a question of doctrine or ritual, notwithstanding that the offence he is charged with is not an offence against morality. GIRT *v.* FILLINGHAM - **Consist. Ct. of St. Albans 176**

6. —— *Officiating without Leave of Incumbent of Parish and contrary to Inhibition of Ordinary —Unconsecrated Building—Public Performance of Divine Service—Administration of Holy Communion—Canon* 71 *of* 1603—*Collection of Offertory Alms — Preaching — The Church Discipline Act*, 1840 (3 & 4 *Vict. c.* 86)—*Monition—Costs.*

It is an ecclesiastical offence under the Church Discipline Act, 1840, for a clerk in Holy Orders of the Church of England to publicly perform any of the services of the Church of England without lawful authority in a parish without the

ECCLESIASTICAL LAW—*continued.*
consent and against the express wish of the incumbent of the parish, and such offence is aggravated where the accused clerk has in so acting disobeyed the inhibition of the Ordinary.

The articles in a criminal suit instituted in the Court of Arches by virtue of letters of request under the Church Discipline Act, 1840, charged the respondent, a clerk in Holy Orders of the Church of England, with having offended against the laws ecclesiastical by having on several specified occasions, in an unconsecrated building in the parish of which the promoter was the incumbent, within two years then last past, without the consent and contrary to the expressed wish of the promoter, and notwithstanding an inhibition of the archbishop of the diocese against the respondent performing any service of the Church in the diocese, read prayers, preached, and performed ecclesiastical duties and divine offices according to the rites and ceremonies of the Church of England. The respondent did not oppose the admission of the articles, but pleaded (inter alia) that there had been no public administration of the services of the Church of England in the building wherein he was charged to have officiated.

At the hearing it was admitted that the respondent had administered the Sacrament of the Lord's Supper in a building not being a private chapel dedicated and allowed by the laws ecclesiastical, and it was proved that on the occasions specified the respondent had conducted the services of the Church of England in the building mentioned in the articles in the presence of the owner of a lease for years of the property on a portion of which the building was built, of members of his family and household, and of other persons, either his undertenants or admitted to be present by his permission, and that at some of such services the respondent had collected offertory alms and delivered addresses to those present; all these acts having been done contrary to the expressed wish of the promoter, and some of them after the service on the respondent of the inhibition of the archbishop of the diocese.

The Dean of Arches being of opinion that the defence of the respondent had not been made out, pronounced that the articles had been sufficiently proved, admonished the respondent from offending in the like manner in the future, and condemned him in the costs of the suit. NESBITT *v.* WALLACE
Arches Ct. of Canterbury 354

EVIDENCE—Brawling—Monition—Clergy discipline. - - - - 176
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—— Divorce—Petition filed but not served—Application for commission—Evidence de bene esse - - - 283
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—— Faculty—Jurisdiction—Admission of fresh evidence on appeal - - 202
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EXECUTION — Will — Acknowledgment — Discrepancy between attestation clause and affidavit of attesting witness - 44
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—— Will, Clause in, inserted by inadvertence of solicitor — Knowledge and approval — Presumption of law - - 335
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EXECUTOR — According to the tenor — "Administer." - - - - 345
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—— Administrator—Death of—Nominee of her executors—Administration bond—Sureties dispensed with - - 333
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—— Practice—Will of domiciled Italian—Appointment of executor—Probate refused—Administration with will annexed granted - - - - 330
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FACULTY—Insertion in faculty of proviso reserving power to the Court to order the removal of Communion Table so authorized - - - - - 73
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—— Interest—Parishioner of new ecclesiastical parish - - - - 95
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—— Jurisdiction—Chancel screen—Architectural adornment—Admission of fresh evidence on appeal - - - 202
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—— Removal of remains from consecrated to unconsecrated ground — Jurisdiction — Evidence—Discretion - - 1
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FINAL OR INTERLOCUTORY ORDER—Consolidated suits — Appeal — Jurisdiction — Costs—Co-respondent - - 258
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FISHERY—Sea fisheries—Oyster-beds—Property in oysters—Jurisdiction—Action in rem —"Damage done by any ship" - 168
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FOG—Collision—"Moderate speed" - 289
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GOVERNMENT STORES—Salvage—Negligence —Liability of charterers of salved vessel
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See Cases under PROBATE.

HUSBAND AND WIFE—*Practice — Husband's Appeal—Effect of Withdrawal of previous Summons — Technical Objection not taken in Court below—Appeal Allowed—Wife's Costs—Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39).

The withdrawal of a summons under the Summary Jurisdiction (Married Women) Act, 1895, has the effect of putting an end to the complaint in respect of which it is issued, and, after the withdrawal, no fresh summons can be issued upon the same cause of complaint.

A ground of objection, however technical, is not waived by the omission to take the objection

HUSBAND AND WIFE—*continued.*
on the hearing of a summons under the Act, but where such an objection is taken by the husband for the first time on the hearing of an appeal and is allowed, the wife (respondent) will be allowed her costs of the appeal. PICKAVANCE *v.* PICKAVANCE - - - - Div. Ct. 60
—— Desertion—"Reasonable excuse" - 317
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—— Divorce.
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—— Grants of administration, Form of oath to lead—Commorientes—Practice - 141
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—— Settlements, Variation of—Jurisdiction—Absolute assignment by husband to wife—"Settlement" - - - 157
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INFANT—Nuncupative will—Volunteer soldier—"In actual military service" - 78
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INSANITY—Divorce—"Unreasonable delay"—Respondent's insanity—Decree - 193
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INTERLOCUTORY ORDER—Final or—Consolidated suits—Appeal—Costs—Co-respondent—Jurisdiction - - 258
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—— Clergy discipline—Brawling—Evidence—Monition - - - - 176
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—— Faculty for removal of remains from consecrated to unconsecrated ground—Evidence—Discretion - - 1
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—— Oyster-beds—Property in oysters—Action in rem—"Damage done by any ship"
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—— Service out of the jurisdiction—Restitution of conjugal rights—Decree - 136
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—— Summary Jurisdiction (Married Women) Act—Husband's appeal—Effect of withdrawal of previous summons—Wife's costs - - - - - 60
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—— Summary Jurisdiction (Married Women) Act, 1895—Income of husband and wife—Computation—Voluntary allowance
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LANCASTER, DUCHY OF—Probate—Death of holder of title—Administration bond—Sureties dispensed with - - 333
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LETTERS OF REQUEST—Divorce—Practice—Substituted service—Portuguese law
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LIGHTS—Collision—Towing lights—Under-way lights—Control of tug by tow - 221
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LODGING CAVEAT—Unauthorized person—Practice—Attachment—Solicitors' Act—Ministerial act - - - 239
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LOSS—Collision—Both ships to blame—Consequential damage—Tortfeasors—Division of loss - - - - 161
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MAINTENANCE—Alimony pendente lite—Separation agreement—Jurisdiction of Court - - - - 87
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MARITIME LIEN—Salvage—Competing maritime liens—Insufficient proceeds—Priorities - - - - 304
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MARRIAGE—Nullity of - - 20, 39
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MARRIAGE SETTLEMENT—Variation, Petition for - - - 20, 157, 196, 348
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MERCHANT SHIPPING—Collision—Towing lights—Under-way lights—Control of tug by tow - - - - 221
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—— Mortgage—Ship—Charterparty—Wrongful seizure—Counter-claim for wages paid
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MONITION — Brawling—Evidence—Clergy discipline - - - - - 176
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—— Officiating without leave of incumbent of parish and contrary to inhibition of Ordinary—Costs - - - 354
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PILOTAGE — Compulsory — Port of Blyth — Foreign vessel—Newcastle Pilot Act 7
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PORTUGUESE LAW—Divorce practice—Substituted service of citations and petition—Letters of request refused - - 132
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POWER OF APPOINTMENT—Divorce—Variation of settlements—Principle of quid pro quo - - - - 348
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PRACTICE — Counter-claim for wages paid — Implied request — Ship — Mortgage — Charterparty—Wrongful seizure - 272
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—— Transfer of action from inferior court—Cross-action in High Court—Conduct of action - - - - 369
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PRESUMPTION OF LAW—Clauses in will inserted by inadvertence of solicitor—Due execution—Knowledge and approval
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PRIORITY—Salvage—Competing maritime liens—Insufficient proceeds - - 304
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PROBATE — *Bond, Administration — Practice—Administration—Intestate Estates—Duchy of Lancaster—Death of Holder of Title—Death of Administrator appointed by her—Nominee of her Executors—Form of Grant—Sureties dispensed with.*

The Court allowed the executors appointed under the will of Her late Majesty Queen Victoria to nominate a person to take a number of grants for their use in the estates of persons who had died domiciled in the County Palatine of Lancaster, and which had been either wholly or partially unadministered.

The Court, however, while consenting to dispense with sureties, required that, inasmuch as the administrator was not to take for the use of the Sovereign, but for the use of the late Sovereign's executors, he should enter into the usual administration bond. IN THE GOODS OF BEST
Jeune Pres. 333

2. —— *Cancellation of Will—Erroneous Impression of Testator as to the effect of an earlier Settlement—Probate of Cancelled Document.*

A testator, on the execution of a will in 1895, caused a will of 1882 to be cancelled under the erroneous belief that funds comprised in a settlement of 1855 would, in the absence of certain provisions in the will of 1882, be divided equally amongst the children of his first marriage. In 1896 he executed a fresh will, and revoked the will of 1895, and later in 1896 he executed two codicils, but the settled funds were not mentioned in any of the documents of 1896.

In a suit by the executors propounding the will and codicils of 1896 together with the will of 1882:—

Held, that the will of 1882 was, in law, a valid and subsisting testamentary document, and that it should be included with the three documents of 1896 in the probate. STAMFORD *v.* WHITE - - - - Jeune Pres. 46

3. —— *Caveat, Lodging — Ministerial Act — Unauthorized Person — Practice — Attachment — Solicitors' Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 26.

Lodging a caveat is a ministerial act; and a person, not being a solicitor, who performs this act on behalf of another, is not liable to attachment under s. 26 of the Solicitors' Act, 1860. *In re* PANTON - - - Jeune Pres. 239

PROBATE—*continued.*

4. —— *Clauses in Will inserted by Inadvertence of Solicitor—Reading over—Testamentary Capacity—Due Execution—Knowledge and Approval—Presumption of Law.*

Without impugning the general rule of law that a competent testator who reads over his will, or to whom it is read over, is to be held to have approved its contents, it is still open to the tribunal before whom the question of the validity of the document may come to find as a fact that the will was not read over in a proper way.

The general rules stated in *Guardhouse* v. *Blackburn*, (1866) L. R. 1 P. & M. 109, and commented on in *Fulton* v. *Andrew*, (1875) L. R. 7 H. L. 448, discussed. GARNETT-BOTFIELD *v.* GARNETT-BOTFIELD - - **Jeune Pres. 335**

5. —— *Clerical Error—Motion to Rectify—Order to Strike out Words—Refusal to Insert another Word — Practice — Will — Residuary Clause.*

Upon an application to rectify a clerical error in the residuary clause of a will:—

Held, that words might be struck out, but that no fresh word could be inserted.

In the Goods of Bushell, (1887) 13 P. D. 7, and *In the Goods of Huddleston*, (1890) 63 L. T. 255, disapproved. IN THE GOODS OF SCHOTT **Jeune Pres. 190**

6. —— *Execution of Will—Acknowledgment—Discrepancy between Attestation Clause and Affidavit of Attesting Witness—No Evidence of any Writing on First Page at Time of Execution.*

In the case of a holograph will, the whole operative portion of which was written on the first page of a sheet of paper, the attestation clause containing the signature of the testator was written on the second page and stated that the will was "signed" by the testator in the presence of the witnesses. An affidavit, made by one witness only, stated that they did not see the first page at all, and set forth facts pointing to acknowledgment only in the presence of the witnesses:—

Held (by Sir F. Jeune, President, doubting), that the will was entitled to probate without notice to the next of kin. IN THE GOODS OF MOORE - - - - **Jeune Pres. 44**

7. —— *Executor, Appointment of—Probate Refused—Administration with Will annexed Granted—Practice—Will of Domiciled Italian.*

Even where the husband consents, the Court will refuse to grant probate to the executor named in the will of a married woman, who dies domiciled abroad; but, with such consent, will make a general grant of administration with the will annexed.

In the Goods of Hallyburton, (1866) L. R. 1 P. & M. 90, and *In the Goods of Tréfond*, [1899] P. 247, commented on and explained. IN THE GOODS OF VANNINI - - **Jeune Pres. 330**

8. —— *Husband and Wife—Commorientes—Form of Oath to lead Grants of Administration—Practice.*

Where a husband and wife with all their children were said to have perished in a massacre, the Court, upon affidavits that they were believed to have died intestate and uninsured, granted letters of administration to the respective next of kin of the husband and wife; and, further, gave leave to vary the usual form of oath to lead the grants, by allowing the administrator and administratrix to swear that the husband and wife perished at the same time (named), and that, after due inquiries, there was no reason to believe that either survived the other. IN THE GOODS OF BEYNON - - - **Gorell Barnes J. 141**

9. —— *Nuncupative Will—Volunteer Soldier—Minor—Wills Act* (1 *Vict. c.* 26), *s.* 11—"*In Actual Military Service.*"

The test to be applied, in considering whether a nuncupative will of a soldier is entitled to probate under the 11th section of the Wills Act, is whether, before the will was made, some step has under orders been taken by the soldier in view of and preparatory to joining the forces in the field.

A printer's apprentice, who was a private in a volunteer battalion and resided with his father in Chichester, sent in his name for active service in the war then being waged in South Africa, was certified as fit by the medical inspector, and, pursuant to an order, went into barracks at Chichester, and while there made his will, being at that time under twenty-one years of age. An order was subsequently received from the military authorities pursuant to which he embarked with his regiment, and he died from a wound received in battle:—

Held, that by taking the step of going into barracks with a view to being drafted to the seat of war, he had brought himself within the operation of s. 11 of the Wills Act, and that he was, at the time he made his will, "a soldier in actual military service"; and, consequently, that his will, though made at a time when he was under age, was entitled to probate. IN THE GOODS OF HISCOCK - - - - **Jeune Pres. 78**

10. —— *Renunciation by Next of Kin—Intestacy—Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73—*Grant needed to complete Title to Leaseholds*—"*Special Circumstances*"—*Grant of Administration to more remote of Kin* (*Brother*) *refused.*

Under an intestacy, the sole property to which the deceased was entitled consisted of a one-third undivided share in certain leaseholds under the will of her grandfather, of whose estate the deceased brother (the present applicant) was administrator de bonis non and himself entitled to another one-third undivided share. The sole next of kin renounced, and the husband of a deceased next of kin also renounced and expressly consented to the brother taking a grant, which was required in order to complete the title on sale of the leaseholds in question:—

Held, that no "special circumstances" had been shewn for invoking the aid of s. 73, and that the application by the brother for administration must be refused. IN THE GOODS OF BROTHERTON **Gorell Barnes J. 139**

11. —— *Renunciation of Next of Kin solely entitled in Distribution—Administration—Grant to Person without Interest in the Estate.*

The Court granted administration to a person who had no interest in the estate of an intestate, where the only next of kin, the sole person

PROBATE—*continued.*
entitled in distribution, had renounced the right to the grant.

In the Goods of Johnson, (1862) 2 Sw. & Tr. 595, followed. IN THE GOODS OF TRIGG
Gorell Barnes J. 42

12. —— *Sureties dispensed with—Grant of Administration—Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 81.

In a case of an estate where all the debts had been paid, and the persons applying for administration were entitled, as the duly constituted legal personal representatives in two other estates, to receive the whole of the residue, the Court dispensed with sureties and directed that the bond of the applicants alone should be accepted. IN THE GOODS OF PATON - **Jeune Pres. 188**

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—— Divorce—Variation of settlement, Petition for—Nullity—Impotence—"Property settled" - - - - **20**
See DIVORCE. 7.

SHIPPING—*Collision—Both Ships to blame—Consequential Damage—Tortfeasors—Division of Loss—Antinomy.*

In an action of damage by collision both vessels were found to blame. The decree, in the usual form, condemned the owners of the defendants' vessel and their bail in a moiety of the plaintiffs' claim in respect of the said damage, and the owners of the plaintiffs' vessel and their bail in a moiety of the defendants' counter-claim in respect of the said damage. At the reference the registrar added to the moiety of the plaintiffs' claim, payable by the defendants, a moiety of the amount of damage recovered from the plaintiffs by the owners of a barge against which the plaintiffs' vessel was driven in consequence of the collision.

The defendants appealed on the ground that, as the plaintiffs and defendants were joint tortfeasors, no contribution could be claimed from the defendants in respect of the damage to the barge paid by the plaintiffs:—

Held, by Sir F. H. Jeune P., that the decree in Admiralty had been properly carried out by adding to the moiety of their damage claimed by the plaintiffs a moiety of the consequential damage recovered by the barge owner from the plaintiffs, and that it was not material that the damage arose out of a tort. THE "FRANKLAND"
Jeune Pres. 161

2. —— *Collision—Fog—"Moderate Speed"*—

SHIPPING—*continued.*

Regulations for Preventing Collisions at Sea, 1897, *art.* 16.

A large twin-screw mail and passenger steam vessel was proceeding up the St. George's Channel in a dense fog at 9 to 10 knots an hour—her full speed being 21 knots—when she sighted a barque about 150 feet ahead, and, in spite of efforts to avoid her, struck her amidships, cutting her in two, with the loss of eleven lives. It was contended on behalf of the owners of the steam vessel that the speed at which she was travelling was moderate in the existing circumstances and conditions, as that speed was the lowest at which she could be readily manœuvred so as to avoid other vessels, and unless she was kept steaming continuously at about that speed, she could not be navigated with safety to herself, as there would be danger from uncertainty both in respect of her course and position:—

Held, by the Court of Appeal (Lord Alverstone C.J., A. L. Smith M.R., and Romer L.J.), affirming the decision of Gorell Barnes J., that the speed was not "moderate" within the meaning of art. 16 of the Regulations of 1897 for preventing collisions at sea, as the terms of that article are imperative, and, as a general rule, speed such that another vessel cannot, after being seen, be avoided, is excessive. If a steam vessel cannot in a fog be continuously navigated at a very slow speed she must, in order to comply with the rule, and in the absence of exceptional dangers of navigation such as may arise from narrow waters or current, be stopped from time to time so as to take off her way. This may involve some inconvenience in the shape of delay, and possibly render it necessary to haul out from the coast, besides requiring proper steps to be taken to verify the position of the vessel, but it gives more opportunity of hearing the sound signals of an approaching vessel, more time to act when necessary, and, if a collision should occur, the consequences are less disastrous. THE "CAMPANIA" - - - - C. A. 289

3. —— *Collision — Negligence — Contributory Negligence—Thames By-laws*, 1898, *art.* 47.

The plaintiffs' steam vessel, proceeding down the river Thames against the tide, neglected—in breach of art. 47 of the Thames By-laws—to wait, before rounding Blackwall Point, "until any other vessels rounding the point with the tide (had) passed clear," and came into collision with the defendants' steam vessel which had come up the river, and was, at the material time, in process of turning preparatory to entering the West India Dock:—

Held, by Sir F. H. Jeune P., that the defendants' vessel was to blame for negligently failing to execute the manœuvre of turning with due regard to the passing traffic; but that the plaintiffs' vessel was also to blame, for, through the breach of art. 47, she had brought herself into a position in which she would not otherwise have been, and by hampering the manœuvre of the defendants' vessel contributed to the collision and damage.

The Margaret (*Cayzer* v. *Carron Co.*), (1884) 9 App. Cas. 873, distinguished. THE "OVINGDEAN GRANGE" - - Jeune Pres. 127

SHIPPING—*continued.*

4. —— *Collision—Salvage—Towing Lights—"Under Way"—Anchor Light—Regulations for Preventing Collisions at Sea*, 1897, *preliminary article, and arts.* 3, 11.

A steam-tug is "under way" within the meaning of the preliminary article of the Regulations for Preventing Collisions at Sea, 1897, when she is fast alongside a vessel which she is moving up to her anchor preparatory to towing her away; and the tug should, therefore, exhibit the towing lights and side lights required by art. 3 of the same regulations, though, *semble*, the vessel herself, whilst her anchor is still in the ground, should continue to exhibit the anchor light required by art. 11 of the same regulations. THE "ROMANCE" - - - Gorell Barnes J. 15

5. —— *Collision — Steering Rules — Sound Signals—"Taking any Course authorized or required by these Rules"—Regulations for Preventing Collisions at Sea*, 1897, *art.* 28.

The plaintiffs' steam vessel, after giving a prolonged blast on her whistle, left a dock entrance in the Mersey under easy starboard helm, and—whilst continuing to round under that helm in order to bring up alongside a wall a short distance further up—came into collision with the defendants' downcoming steamer. It was alleged on behalf of the defendants that those in charge of the plaintiffs' vessel should have indicated that she was directing her course to port by giving two short blasts of her whistle in accordance with art. 28 of the Regulations for Preventing Collisions at Sea, by which, "when vessels are in sight of one another, a steam vessel under way, in taking any course authorized or required by these rules, shall indicate that course by" the appropriate signal:—

Held, by Sir F. H. Jeune P., that the rule was not applicable, as the starboard action of the helm began before leaving the entrance, and, when the other vessel was in sight, the plaintiffs' vessel was not, with reference to that other vessel, taking a course authorized or required by the rules.

Cases in which the rule would apply considered. THE "MOURNE" - Jeune Pres. 68

6. —— *Collision — Towing Lights — Underway Lights—Control of Tug by Tow—Damage—Mersey Rules*, 1900, *art.* 4 (*a*)—*Regulations for Preventing Collisions at Sea*, 1897, *art.* 3—*Presumption of Fault—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 419, *sub-s.* 4.

The plaintiffs' steam vessel was lying at anchor in the river Mersey waiting to dock, and, as her engines were broken down, she had a tug fast alongside to hold her up against the flood tide in the event of her anchor dragging. The defendants' steam vessel coming up the river ran into the plaintiffs' vessel, and was found to blame for bad look-out; but the plaintiffs' vessel was also found to blame on the ground that the tug was, at the material time, exhibiting misleading, namely, under-way, instead of towing, lights.

The plaintiffs appealed:—

Held, by the Court of Appeal (Lord Alverstone C.J., A. L. Smith M.R., and Romer L.J.), affirming the decision of Sir F. H. Jeune P., that

as the tug was "attached for the purpose of towing or manœuvring" the plaintiffs' vessel within the meaning of art. 4 (*a*) of the Mersey Rules, 1900, she should have exhibited the towing lights prescribed by art. 3 of the Regulations for Preventing Collisions at Sea, 1897. Secondly, that as the misleading lights exhibited by the tug might by possibility have contributed to the collision, the plaintiffs' vessel was to "be deemed to be in fault," for the word "ship" in the clause "the ship by which the regulation has been infringed," in sub-s. 4 of s. 419 of the Merchant Shipping Act, 1894, must be construed to mean the plaintiffs' vessel, the master of which, though in a position to exercise control, had improperly neglected to prevent the tug infringing the regulation. THE "DEVONIAN" C. A. 221

7. —— *Mortgage — Ship — Charterparty — Wrongful Seizure—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 34—*Counter-claim for Wages paid—Implied Request.*

The plaintiff entered into an agreement with the owners of a steam vessel to run her on specified daily excursion trips for about six weeks, dividing the profits after deducting expenses, and advancing the money to liberate part of the machinery held as a lien for repairs. In respect of the advance for the liberation of the machinery, and other advances previously made, as well as in respect of any repairs executed, the plaintiff to have "a charge and lien on the boat ranking in the highest position the owners are able to fix having regard to the existing circumstances."

A week after the trips commenced an instalment of the purchase-money owing to the defendant, the former owner of the vessel, fell due, and, on non-payment, the defendant, under a mortgage given by way of collateral security, seized her, alleging that the agreement between the plaintiff and the owners of the vessel was not binding upon him as it postponed his rights as mortgagee and depreciated the saleable value of the vessel. In an action for wrongful seizure, Sir F. H. Jeune P. gave judgment in favour of the plaintiff ([1901] P. 143) on the ground that the charge and lien on the vessel were subordinated to the rights of the defendant as mortgagee, and the mode of employment was not unusual for a vessel of the description of the steamer in question:—

Held, by the Court of Appeal (Lord Alverstone C.J., A. L. Smith M.R., and Romer L.J.), affirming the decision of the Court below, that the agreement was binding on the mortgagee, for, though the powers of a mortgagor, as owner, are, by s. 34 of the Merchant Shipping Act, 1894, limited by the proviso, "Except as far as may be necessary for making a mortgaged ship available as a security for the mortgage debt," these powers had not been exceeded, the test to be applied being that laid down in *Collins* v. *Lamport*, (1864) 34 L. J. (Ch.) 196, namely, whether the mortgagor's dealings with the vessel materially impair the security. THE "HEATHER BELL" C. A. 272

8. —— *Oyster-beds — Property in Oysters—Sea Fisheries Act*, 1868 (31 & 32 *Vict. c.* 45), *ss.* 51, 53 — *Jurisdiction — Action in Rem —*

"Damage done by any Ship"—Admiralty Court Act, 1861 (24 *Vict. c.* 10), *ss.* 7, 35.

The plaintiffs, owners of oyster-beds at the mouth of a navigable river, brought an action in rem against the defendants, as owners of a vessel, for so negligently navigating her as to ground on the property of the plaintiffs, and thereby do damage to their oysters and oyster-beds:—

Held, by Sir F. H. Jeune P., that the damage was "done by a ship" within the meaning of s. 7 of the Admiralty Court Act, 1861, and therefore the action would lie. Secondly, that as the damage was not done by grounding in the ordinary course of navigation, or without notice of the existence of the oyster-beds, the defendants were liable for the negligence of those in charge of their vessel; and, thirdly, that as the plaintiffs had property in the soil, and by s. 51 of the Sea Fisheries Act, 1868, in the oysters, they were entitled to enforce their claim for damages not only in respect of the disturbance of the beds, but also in respect of the destruction of the oysters. THE "SWIFT" Jeune Pres. 168

9. —— *Pilotage—Compulsory Pilotage—Port of Blyth—Foreign Vessel—Newcastle Pilot Act* (41 *Geo.* 3, *c. lxxxvi.*), *s.* 6.

Pilotage is compulsory on a foreign vessel resorting to, or coming into, or departing from, the port of Blyth, for that port is one of the creeks or members of the port of Newcastle-upon-Tyne unaffected by legislation subsequent to the Newcastle Pilot Act, 1801 (41 Geo. 3, c. lxxxvi.), s. 6. THE "HOLAR" Gorell Barnes J. 7

10. —— *Practice—Transfer of Action from Inferior Court—Cross-action in High Court—Conduct of Action.*

The rule laid down in *The Never Despair*, (1884) 9 P. D. 34—namely, that when an action is transferred from an inferior court and consolidated with a cross-action begun in the High Court, the plaintiffs in the action in the inferior court will be placed in the position of plaintiffs in the consolidated actions, if they began the action in the inferior court before the cross-action in the High Court—will not be followed unless there is clear priority in time, so that where the commencement of the two actions is practically simultaneous the action in the High Court will be treated as the principal cause. THE "MERSEY" Jeune Pres. 369

11. —— *Salvage — Action in Personam — —Government Stores — Negligence — Liability of Charterers of Salved Vessel.*

Government stores were shipped on a chartered vessel under bills of lading signed by the master by direction of the charterers, not exempting the shipowner from liability for negligence, and subject to the stipulations of a freight engagement entered into with the charterers by a Government department under which the owners (the term including the charterers) were responsible for the safe delivery of the stores. The vessel, through the negligence of her master and crew, came into collision with another vessel, and was so much damaged as to require salvage assistance in putting back to the port of shipment, where the stores were returned to the Govern-

SHIPPING—*continued.*
ment department. In an action of salvage in personam by the salvors against the charterers:—
Held, by the Court of Appeal (Lord Alverstone C.J., A. L. Smith M.R., and Romer L.J.), affirming the decision of Sir F. H. Jeune P., that, as the charterers were directly interested in the preservation of the goods, the salvage service was a benefit to them, and, therefore, on the authority of *Five Steel Barges*, (1890) 15 P. D. 142, and *Duncan* v. *Dundee Shipping Co.*, (1878) 5 R. 742, the action would lie. THE CARGO EX "PORT VICTOR" - - - - **C. A. 243**

12. —— *Salvage—Damage by Ship to Landing-stage—Competing Maritime Liens—Insufficient Proceeds—Priorities.*
A foreign steam vessel, with engines broken down, after being safely towed into the Mersey by salvors, was run into by another vessel, and, to prevent her sinking in deep water, second salvors endeavoured to beach her, with the result that she came in contact with, and damaged, a landing-stage belonging to the Mersey Dock Board. As a wreck obstructing the navigation, the Board, under their statutory powers, took possession of her, raised, and sold her, paying the net proceeds into court after deducting expenses. The proceeds were insufficient to meet the claims of the two salvors and the claim of the Dock Board for the damage done to the landing-stage.
On the question of priorities:—
Held, by Gorell Barnes J., that the claim of the Dock Board came first, then that of the second salvors, and lastly that of the first salvors, for—as between the Dock Board and the salvors—the Board had a maritime lien for the damage done, and, whether the Board had a maritime lien or not, the right of the Board to proceed in rem overrode the prior lien of the salvors, as being based on a claim against the wrong-doing vessel ex delicto, involving no option in the sufferer, whereas the salvors in voluntarily undertaking to render services incurred the risk of subsequent claims attaching. Secondly, as between the two salvors, the ordinary rule applied giving the claim of the second salvors precedence, on the ground that their exertions tended to preserve the res for the benefit of earlier claimants. THE "VERITAS" - **Gorell Barnes J. 304**

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WILL—*Executor according to the Tenor*—"*Administer*"—*Construction of Will.*

A testator, by his will, appointed H. E. "to hold and administer in trust all my estate well known to the said H. E." :—

Held, that as this person had duties to perform, the word "administer" was, without any express instruction to pay debts, sufficient to constitute him executor according to the tenor. IN THE GOODS OF WAY - **Gorell Barnes J.** 345

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